Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States

KAROL K. HOWARD,

Petitioner,

v.

COLUMBIA PUBLIC SCHOOL DISTRICT, JAMES R. RITTER, AND CHERYL COZETTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 2004

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QUESTIONS PRESENTED

1. Under 42 U.S.C. §1983 (First Amendment), if a public employee is removed from his or her job position and dismissed as a result of intentionally discriminatory actions of biased subordinates, said bias which is inextricably linked to the employee's exercise of free speech, whether the bias of the subordinates who have no decisionmaking authority, but who exercised substantial influence over an employment decision can be imputed to the formal decisionmaker who acts for the employer, in order to establish liability?[1]

2. In §1983 First Amendment cases, is summary judgment precluded where questions regarding an employer's motive predominate in the inquiry regarding how important a role the protected speech played in the employment decision?

[1] This issue is similar to and related to the Petition for Writ of Certiorari in *Hill v. Lockheed Martin Logistics Management, Inc.*, Case No. 03-1443, which is pending before this Court.

PARTIES TO THE PROCEEDING

The Petitioner is Dr. Karol K. Howard.

The Respondents are Columbia Public School District, Dr. James Ritter and Dr. Cheryl Cozette.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Karol K. Howard respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on April 13, 2004.

OPINIONS BELOW

The April 13, 2004, panel opinion of the United States Court of Appeals for the Eighth Circuit is reported at 363 F.3d 797 (8th Cir. 2004) and is reprinted at App. 1a-14a. The February 27, 2003, order of the United States District Court for the District of Missouri is reprinted at App. 15a-55a.

STATEMENT OF JURISDICTION

The Eighth Circuit filed its decision on April 13, 2004, and entered an order denying petitioner's petition for rehearing on May 18, 2004. App. 56a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1983, 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be held liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This is a First Amendment retaliation case under 42 U.S.C. §1983. Petitioner, Karol Howard, Ph.D., with a 22-year career as both a teacher and principal, sued the Columbia Public School District and superintendents, Dr. James Ritter and Dr. Cheryl Cozette, alleging she was removed from her principal position and subsequently nonrenewed in retaliation for her speech in which she spoke out against discriminatory educational practices against African-American, special education and economically disadvantaged (poor) students. She also contends Respondents denied her equal protection of the laws, in violation of 42 U.S.C. §1983.

During 1998-2000, Dr. Howard began her employment with the Columbia Public School District, in Columbia, Missouri, as principal of Robert E. Lee Elementary School. Notwithstanding having received excellent performance evaluations, in June, 2000, Dr. Howard was removed as principal, with no notice nor hearing, and demoted to a research position. In 2001, Dr. Howard's contract was not renewed.

Robert E. Lee Elementary School ("Lee") historically had been an arts school with special permission students (Caucasian). In the 1999-2000 school year, Lee School's demographics changed dramatically, resulting in a drastic decrease of special permission students. The student population changed with Lee School now serving a high

percentage of African-American students, international students, and a high percentage of at-risk students, including students with special needs (special education, handicapped and disabled), and economically disadvantaged students. The Lee school teaching staff is all caucasian.

Dr. Howard spent the 1998-1999 school year at Lee observing and focusing on developing rapport with the staff and students, which was accomplished, including with Dr. Cozette. She received an excellent evaluation by Dr. Cozette in all aspects of her job performance, including excellence in communication and interpersonal skills. Dr. Howard was offered a principal contract for the 1999-2000 school year.

Dr. Howard observed teachers engaging in discriminatory practices towards students

In the 1999-2000 school year, Dr. Howard observed several teachers engaging in racist and discriminatory practices towards African-American, special needs and economically disadvantaged students. The teachers were not providing equal educational opportunities to these classes of students.

Dr. Howard observed teachers disciplined African-American, special needs and disadvantaged students on a disproportionate basis. Dr. Howard observed a disproportionate number of African-American students were being removed from the classrooms and were not receiving any instruction whatsoever. This practice put these students at an educational disadvantage, denying quality instruction to those children needing it the most, to wit: the minority, special needs and poor children. Dr. Howard also observed teachers excluding a number of minority and special needs students from field trips. Dr. Howard presented evidence of teachers excluding over 150 students from field trips, classroom activities and assemblies. All of the students

were minority, special needs or economically disadvantaged.

Dr. Howard presented evidence that several Lee teachers did not want to provide educational services to minority, special needs and disadvantaged students. As but one of many examples, those teachers excluded international (ESL) students from Title I/Reading Recovery services because the students were not "Americans." Some teachers would not teach special needs students in their classrooms, resulting in many students not receiving all their required individualized educational plan (IEP) minutes.

While at school these same teachers would make comments disparaging minority students and their parents, referring to the parents as "prostitutes," "strippers," or "on drugs." Disparaging comments were made about students' socioeconomic status. Teachers spoke to students in a degrading, demeaning and nonrespectful manner. One teacher repeatedly yelled at her kindergarten students, calling them the "class from hell." Other teachers went to Dr. Howard to complain because the comments being made were unprofessional and discriminatory.

The very teachers who engaged in the racially discriminatory practices, as well as the PTA, wanted more special permission students (Caucasian students) to attend Lee, rather than the minority students who resided in the school's attendance area. Dr. Howard was repeatedly asked "to lobby" Dr. Cozette to change the school's attendance boundaries. Dr. Howard's response to the teachers was, "We can't do that. You know what it looks like – racism." Dr. Howard advised Dr. Cozette. There was no response by Dr. Cozette.

Students' achievement test scores corroborated Dr. Howard's observations of the effect the teachers' discriminatory practices had on the minority and disadvantaged students: the scores demonstrated large achievement gaps with the minority and disadvantaged students scoring the lowest in all content areas. In the 1999-2000 school year,

the District began to emphasize literacy through District-wide literacy and school improvement plans. The District's new plans required a change in instructional strategies. The resistance by many Lee teachers was intense, and there was a refusal to implement literacy and school improvement.

It was apparent to Dr. Howard that the teachers' discriminatory practices were resulting in minority, special needs and poor students receiving an inferior, second class education, which placed these students at an educational disadvantage.

Dr. Howard spoke out opposing the teachers' discriminatory practices

In the 1999-2000 school year, Dr. Howard exercised her First Amendment right to oppose the discriminatory practices and exert all efforts to eliminate the discriminatory educational environment adversely affecting the minority, special needs and poor students at Lee.

In faculty meetings, school improvement meetings and to teachers individually, Dr. Howard spoke out about improving minority students' test scores and the importance of minority and disadvantaged students receiving an equal education. The meetings often focused on how to improve the education of Lee's "at-risk students", all of whom were African-American, special needs or poor. Dr. Howard regularly spoke to teachers about literacy and school improvement and changing instructional strategies to meet the needs of the whole Lee student population. Several teachers showed little or no concern that students were not achieving.

On numerous occasions, Dr. Howard advised Dr. Cozette that teachers did not want to teach special needs students. Dr. Howard specifically used the term "special needs" when speaking to Dr. Cozette. (App. 1519, 1521). Similarly, on numerous occasions, Dr. Howard spoke with Dr. Cozette about Lee's minority and disadvantaged

population not receiving the same education as other students. There was no response from Dr. Cozette.

Concerning the discriminatory treatment and discipline of students, Dr. Howard spoke to the teachers about treating all students equally regardless of race or socioeconomic status. Teachers were told they could not arbitrarily exclude students from field trips and class activities, and that all students were to be provided the full educational opportunities of Lee School. Dr. Howard also communicated to teachers not to speak negatively about students. Dr. Howard told the kindergarten teacher that she could not refer to her class as the "class from hell", that her focus was to help students learn.

Dr. Howard presented evidence that she voiced her concerns in a sincere and respectful manner. A number of Dr. Howard's fellow staff members at Lee confirm that her speech and manner were professional, not disruptive or disrespectful, that at faculty meetings she was always pleasant and collegial, and she was supportive of teachers. Even Dr. Cozette's observations of Dr. Howard were positive. She observed Dr. Howard consistently demonstrated positive interpersonal relationships with students, staff, administrators and parents. Dr. Cozette's evaluations of Dr. Howard stated that her interactions with teachers were mutually respectful and friendly, she maintained positive relationships with her staff and worked well with parents in the school community. (App. 1814, 1817).

Dr. Howard's speech did not affect the ability of teachers at Lee to deliver their educational services, nor did her speech diminish the quality of education being provided. Indeed, under Dr. Howard's leadership, test scores improved. Dr. Cozette testified that when she was at Lee, the business of the school was being properly conducted according to district policies. There was no disharmony and Respondents did not raise this issue in their Motion for Summary Judgment.

Teachers resented and were offended by Dr. Howard's speech

Several teachers resented and took offense with Dr. Howard's speech, not liking her speech on improving instruction, and improving achievement and reading scores for minority and disadvantaged students. One teacher, Mrs. Ridge, testified she did not like Dr. Howard speaking at faculty meetings about improving test scores. Two teachers, Mrs. Altomari and Mrs. Mehl, testified they did not like Dr. Howard emphasizing academics over "art." There were several teachers, including Mrs. Andre and Mrs. Dye who rejected Dr. Howard's speech about literacy and school improvement. One teacher claimed Dr. Howard made a threat, but when asked what the threat was, she testified, Dr. Howard said: "literacy has to improve or every school will have a school improvement plan and your choice is to either make it yourself or have someone come in and make it for you." (Def.App. 1476).

This same group of teachers disagreed with Dr. Howard's speech advising teachers not to exclude students from field trips and class activities. They complained about Dr. Howard's policy of not excluding students from the classrooms or from field trips, and her discipline policies. On numerous occasions, Dr. Howard advised Dr. Cozette that teachers were excluding minority and special needs students from field trips. Dr. Howard testified, "I told Dr. Cozette it was minority children."[2] (App. 1520). In May, 2000, Dr. Cozette told Dr. Ritter that Dr. Howard was concerned about the number of students being excluded from field trips. Dr. Ritter testified Dr. Cozette told him that Dr. Howard was concerned about the exclusion of

[2] The lower court erroneously stated in its opinion that Dr. Howard did not use the word "minority" when speaking to Dr. Cozette. Dr. Howard directly pointed out to the lower court in her briefings that she did tell Dr. Cozette minority students were being excluded from field trips.

"special education" students from field trips. This same group of teachers also disagreed with Dr. Howard's speech advising them that the attendance boundaries could not be changed so more special permission students could attend Lee.

Dr. Howard presented substantial evidence *prior* to her speech there were no problems or tensions and that teachers supported her leadership. Dr. Howard presented substantial evidence from numerous faculty members who heard Dr. Howard speak at faculty meetings about providing equal educational opportunities to all students, that *after* her speech, several teachers resented Dr. Howard's speech.

Teachers complained about Dr. Howard to Dr. Ritter and Dr. Cozette

The teachers who resented Dr. Howard's speech banded against her. They wanted to maintain the status quo: that is, continue with the discriminatory practices against Lee's minority, special needs and disadvantaged students. In June, 2000, this group of teachers (including four teachers, Andre, Dye, Ridge and Altomari), met together and decided on a plan of action: they would contact Dr. Ritter and contact parents to write letters about Dr. Howard to Dr. Ritter. Dr. Ritter subsequently received an anonymous letter from a "concerned citizen." There was evidence the "concerned citizen" letter came from teacher Mrs. Andre. Mrs. Andre also telephoned two parents and the PTA president who then sent letters to Dr. Ritter about the "morale" of the building which they had heard about, but did not observe. Mrs. Andre sent to Dr. Ritter a letter dated June 10, 2000 which contained 17 signatures, 14 of whom were Lee employees.[3] The letter was signed by the

[3] During the 1999-2000 school year there were 57 employees assigned to Lee School. There was substantial evidence that most of the

(Continued on following page)

same teachers who had engaged in the discriminatory practices and who were offended with Dr. Howard's speech. The letter stated the teachers wanted to bring to Dr. Ritter's attention "the strained professional relationship between Dr. Howard and the Lee staff."

Dr. Howard was removed as Lee principal

On June 16, 2000, Dr. Cozette met with Dr. Howard and informed her that she might not be principal of Lee School. On June 28, 2000, Dr. Cozette formally advised Dr. Howard she had been removed from her Lee principalship. On July 11, 2000, Dr. Howard met with Dr. Ritter and Dr. Cozette. Dr. Howard was demoted to a research job, a nonadministrative position for which there were no job duties. Dr. Ritter told Dr. Howard he did not know how long he would have funding for the position. Dr. Howard did not accept the research position. The District sent a contract to Dr. Howard, which she did not sign or return. Dr. Howard retained an attorney who negotiated a principal position at Blue Ridge Elementary School, where she served during the 2000-2001 school year. While at Blue Ridge, there were no complaints of any kind by faculty, staff, parents or students. In Spring, 2001, 42 of 44 faculty members signed a support letter for Dr. Howard and presented it to District administration. The Blue Ridge teachers wanted Dr. Howard to be the Blue Ridge principal, for which there was a vacancy for the next school year. Dr. Ritter saw the support letter while Dr. Howard was still an employee of the District.

Lee staff were not contacted nor told of the existence of the June 10 letter to Dr. Ritter, nor were they informed as to what this group of teachers were up to.

Dr. Ritter recommended to the Board that Dr. Howard's contract not be renewed

While at Blue Ridge, Dr. Howard spoke out at Dr. Ritter's Literacy Summit (meeting) about substandard education being provided to students. She also informed Dr. Ritter and Dr. Cozette in a letter that minority students at Lee School were receiving a substandard education. In April, 2001, Dr. Ritter recommended to the Board that Dr. Howard's contract be nonrenewed. At the Board meeting where the Board voted not to renew Dr. Howard's contract, the Board did not have Dr. Howard's personnel file nor her job performance evaluations, but did have the June 10 letter signed by the teachers about Dr. Howard. At the time of the nonrenewal, there were two other principal position openings at Blue Ridge Elementary School and several other principal vacancies within the District. Dr. Howard was not considered for any of the positions, even though she had much greater qualifications than those persons the District eventually hired. Dr. Cozette and Dr. Ritter participated in the principal selection process.

Dr. Howard was treated differently than other principals

Respondents produced no evidence specifically identifying by name any other principal speaking out as Dr. Howard did. There is, however, extensive evidence of other principals who were similarly situated to Dr. Howard, whom Dr. Cozette observed had interpersonal problems with teachers, poor staff morale, poor communication skills, lack of leadership, and did not maintain a positive school climate. These principals were not removed from their positions, but were provided with improvement plans and remediation, while Dr. Howard was not. This vital and critical evidence of disparate treatment against Dr. Howard was not addressed by the lower court.

Proceedings Below

The legal issue in the Courts below was whether Dr. Howard's speech was a motivating factor in the Respondents' decision to take adverse employment action against her.[4] The district court granted summary judgment in favor of Respondents on Dr. Howard's First Amendment claim holding that Dr. Howard had not established causation. On appeal, a panel of the Eighth Circuit Court of Appeals affirmed the award of summary judgment, concluding Dr. Howard had not presented evidence that her speech motivated Respondents to take the adverse employment actions against her, nor had Dr. Howard presented evidence to counter Respondent's evidence that she was removed because of "tension among faculty." (App. 6a-8a).

The lower court's opinion did not address Dr. Howard's evidence of causation, including the evidence that Dr. Ritter and Dr. Cozette were substantially influenced by the teachers who were offended by Dr. Howard's speech and were motivated to have her removed, and that Dr. Ritter and Dr. Cozette knew the teachers were singularly motivated by Dr. Howard's speech. Further, the lower court, while accepting Respondents' explanation for the adverse employment actions, that is, "tension among faculty" between Dr. Howard and the teachers, its opinion is entirely silent on *why* there was tension, even though Dr. Howard consistently asserted the cause of the tension was her protected speech. The lower court did not address Dr. Howard's evidence that the adverse actions Respondents took against her were inextricably linked to her speech. These factual allegations and issues were raised by Dr. Howard in her judicial complaint, in her evidence which she presented to the lower courts in response to the

[4] The lower court stated it would assume for purposes of the appeal that Dr. Howard's speech involved a matter of public concern. (App. 6a-7a).

Respondents' motion for summary judgment, in her written briefs to the lower courts, and in oral argument to the Eighth Circuit Court of Appeals.

Dr. Howard presented evidence to the lower court proving Respondents were motivated by Howard's speech

Although at this stage in the litigation some of the facts remain in dispute, the record contains substantial evidence from which a factfinder could reasonably conclude that the group of teachers, who resented and were offended by Dr. Howard's speech, substantially influenced Respondents' decisions to remove Dr. Howard from Lee and subsequently nonrenew her contract. Further, a factfinder could reasonably conclude that Dr. Ritter and Dr. Cozette knew the teachers were motivated by Dr. Howard's speech and therefore, Dr. Ritter and Dr. Cozette were motivated by Dr. Howard's speech when they took the employment actions against Dr. Howard.

First, there was evidence the critical source relied on by Dr. Ritter and Dr. Cozette in their decision to remove Dr. Howard from her position as Lee principal was the teachers' complaints. Dr. Cozette and Dr. Ritter had no personal knowledge of the allegations made by the teachers which were the ostensible justification for the removal. In fact, the teachers' allegations were completely inconsistent with Dr. Cozette and Dr. Ritter's own personal observations of Dr. Howard, wherein they observed Dr. Howard was always professional and demonstrated positive interpersonal skills with them, staff, parents and students.

Second, there was evidence that the Board of Education was aware that teachers did not agree with Dr. Howard's speech and that Dr. Howard was removed from her position as Lee principal because of her speech to teachers. At a September 2000, Board meeting, members of the Board inquired of Dr. Ritter about Dr. Howard's removal. In response to the questions asked by Board

members, Dr. Ritter told the Board that teachers were upset about things Dr. Howard was saying in faculty meetings, about not excluding students from field trips and the special permission issue. Dr. Cozette attended that meeting.

Third, there was evidence Dr. Ritter and Dr. Cozette were aware teachers did not agree with Dr. Howard's speech. Throughout Spring, 2000, on numerous occasions Dr. Howard advised Dr. Cozette both orally and in e-mails teachers were resisting her speech and her efforts to eliminate the teachers' discriminatory practices towards students. Dr. Howard repeatedly advised Dr. Cozette of teachers' strong resistance to literacy and school improvement. In May, 2000, Dr. Howard told Dr. Cozette that certain teachers were not going to let school improvement happen at Lee – that they would do anything to stop it. Dr. Cozette told Dr. Ritter of the teachers' resistance. Dr. Ritter testified he was aware Lee teachers were resistant to the district's literacy and school improvement programs. Dr. Cozette's own e-mails to Dr. Howard demonstrate Dr. Cozette's awareness of teachers who were resistant to Dr. Howard's speech.

Fourth, in May, 2000, two staff members who were supportive of Dr. Howard and her speech, (Jean Andrews and Karen James) communicated with Dr. Cozette about the teachers who were unprofessional towards Dr. Howard. They were the same teachers who were resisting Dr. Howard's speech.

Fifth, at a June, 2000 meeting with Dr. Cozette, five teachers who signed the June 10, 2000 letter to Dr. Ritter, met with Dr. Cozette to voice their disagreement with several of Dr. Howard's policies about literacy, school improvement, field trips, classroom exclusions, and student discipline.

Sixth, prior to Dr. Howard being told by Dr. Cozette she was being removed from the Lee position, Dr. Howard wrote a letter to Dr. Ritter in which she advised him of teacher resistance to her efforts as to literacy, school improvement, and to changes being made at Lee school.

Seventh, Dr. Ritter received a letter from Dr. Howard's attorney informing him that Dr. Howard was being retaliated against for her speech in violation of the First Amendment. The letter specifically referenced Dr. Howard's speech addressing poor educational performance in the school, the intransigent teaching staff who did not agree with Dr. Howard's speech on literacy and equal educational opportunities for all students including disadvantaged students. There was no investigation by Respondents.

Eighth, Board president, David Ballenger testified that when the Board of Education convened and voted to nonrenew Dr. Howard's contract, the Board did not have Dr. Howard's personnel file nor her job performance evaluations at the meeting, but had at the Board meeting the June 10, 2000 letter signed by the teachers who opposed Dr. Howard's speech. Dr. Ritter was at the Board meeting and made the recommendation not to renew Dr. Howard's contract.

Ninth, in early June, 2000 Dr. Howard told Dr. Cozette in writing on the district's "Feedback about 1999-2000" form that the lives of minority and disadvantaged students were literally in chaos and that progress was being impeded by certain Lee teachers who had "written off" these students. Dr. Cozette told Dr. Ritter about what Dr. Howard had written.

REASONS FOR GRANTING THE WRIT

Free speech is fundamental to our democracy and liberties. Freedom from retaliation for exercising the right

to free speech is also fundamental. Millions of our citizens in this country are employed in the public sector. When public employees exercise their right to freedom of speech and they are retaliated against in their employment for speaking out, not only has their freedom of speech been abridged, but the rights of all our citizens to free speech have been lessened.

Evidentiary and proof requirements as to the types of evidence which may be used to prove causation in §1983 First Amendment cases raise exceptionally important questions of federal law which are of great importance to the public citizenry. The Court's decision in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), which addressed the proof requirements in a §1983 First Amendment case does not address the questions raised in this case. As to those Circuits which have addressed the questions raised in this case there is an inter-circuit conflict between the Eighth Circuit and the other Circuits. Without guidance from this Court, the confusion among the lower federal courts will continue to lead to inconsistent treatment of a plaintiff's evidence to establish causation in §1983 First Amendment cases. Such inconsistent treatment involves the risk of erroneously punishing protected speech. Further, the Eighth Circuit's decision in this case is erroneous and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Permitting the lower court's decision to stand creates a danger that employees' rights to freedom of speech will be abridged in violation of the First Amendment. The Court's review is warranted for all of these reasons.

QUESTION ONE

UNDER 42 U.S.C. §1983 (FIRST AMENDMENT), IF A PUBLIC EMPLOYEE IS REMOVED FROM HIS OR HER JOB POSITION AND DISMISSED AS A RESULT OF INTENTIONALLY DISCRIMINATORY ACTIONS OF BIASED SUBORDINATES, SAID BIAS WHICH IS INEXTRICABLY LINKED TO THE EMPLOYEE'S EXERCISE OF FREE SPEECH, WHETHER THE BIAS OF THE SUBORDINATES WHO HAVE NO DECISION-MAKING AUTHORITY, BUT WHO EXERCISED SUBSTANTIAL INFLUENCE OVER AN EMPLOYMENT DECISION CAN BE IMPUTED TO THE FORMAL DECISIONMAKER WHO ACTS FOR THE EMPLOYER, IN ORDER TO ESTABLISH LIABILITY?

I. Review Is Warranted Because the Eighth Circuit's Decision Is in Direct Conflict with Circuit Court Decisions on This Important Aspect of Federal Law

In this case, teachers, who were subordinate employees, exercised substantial influence over Respondents' decisions to remove Dr. Howard from her position as Lee principal and to nonrenew her contract. The teachers were motivated by Howard's speech and went to Respondents with complaints about her. The teachers' complaints was the critical source relied on by Dr. Ritter and Dr. Cozette in their decision to take adverse actions against Howard. The lower court did not consider the substantial influence the teacher complaints appeared to have on the Respondents as critical evidence that Respondents were motivated by Howard's speech when they removed Howard from the Lee principal position and nonrenewed her contract. The lower court's decision creates a conflict between the Eighth Circuit and most other Circuit Courts that have considered this question.

A. The Conflict of Law Which Exists in This Case is the Same Conflict Which Exists in *Hill v. Lockheed Martin Logistics Management, Inc.*

Pending with this Court is a Petition for Writ of Certiorari, *Hill v. Lockheed Martin Logistics Management, Inc.*, Case No. 03-1443. The facts in *Hill* involve a subordinate, Fultz, who motivated by age and gender bias, took affirmative steps to get Hill fired. Fultz provided information to Griffin, a high level supervisor, who relied on the information and terminated Hill's employment. The legal issue in the lower courts was "whether such discriminatory actions and motives on the part of Fultz were sufficient to provide a basis for imposing liability on Lockheed." *Hill* Petition for Writ of Certiorari, page 3. In *Hill*, the district court granted summary judgment to the employer reasoning that the discriminatory motive on the part of Fultz was irrelevant, because "the person against whom bias is asserted also must be the person who makes the employment decision." On appeal the Fourth Circuit reversed the award of summary judgment.[5] The Fourth Circuit then heard the case *en banc* and voted to reinstate the award of summary judgment.[6]

In the *Hill* Petition for Writ of Certiorari, Hill points to a sharp conflict among the Circuits on the issue of whether a Plaintiff can demonstrate the existence of unlawful discrimination through evidence of bias on the part of "those in a position to influence the decisionmaker" or, whether a finding of liability must be based on evidence that "the actual decisionmaker had a discriminatory motive." Hill cites to numerous decisions from the Courts of Appeals on both sides of the spectrum, showing a

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[5] *Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657 (4th Cir. 2003).

[6] *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004).

divisive split among the circuits. *Hill* Petition for Writ of Certiorari, pages 10-19. Hill's position advanced to the Court on this issue was:

> [T]he majority rule in the courts of appeals is that an employer is liable under Title VII and the ADEA if a discharge or other adverse action was caused by a discriminatory company official who, although not the actual decisionmaker, exercised significant influence over the decisionmaking process.

Hill Petition for Writ of Certiorari, page 8.

In this case, Dr. Howard advances the same position as *Hill*. While *Hill* is a Title VII and ADEA case, the same conflict of law as stated in *Hill* exists in this §1983 First Amendment case.[7] Therefore, should this Court grant a Writ of Certiorari in *Hill v. Lockheed Martin Logistics Management, Inc.*, and should this Court determine a Plaintiff may demonstrate the existence of unlawful motivation through evidence of bias on the part of those who influence the actual decisionmaker, such a decision would have a direct bearing on this case and other employment cases brought under 42 U.S.C. §1983 and other anti-discrimination statutes.[8] Therefore, Howard's case is directly related to *Hill*. For this reason, this case warrants review by the Court and Petitioner requests the Court to

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[7] In fact the causation required to establish a claim under §1983 is identical to that required under Title VII. *Brennan v. Norton*, 350 F.2d 399, 420 (3rd Cir. 2003).

[8] This same issue could recur in Title VI and Title IX cases. This Court has granted certiorari in *Jackson v. Birmingham Board of Education*, No. 02-1672. Should the Court determine there is a private cause of action for those employees who suffer an adverse employment action because they have made a complaint about discrimination which is in violation of Title VI or Title IX, then any decision made by the Court on this issue raised by Howard and Hill would have a direct bearing on those cases.

grant a Writ of Certiorari in her case and in the *Hill* case and consider the two cases together.[9]

B. The Eighth Circuit's Decision Is in Direct Conflict with Other Circuit Courts Which Have Addressed This Question in §1983 cases

This same question has arisen in §1983 First Amendment cases. When the question has arisen the other circuits, including the Fourth, Sixth, Ninth and Tenth Circuits, all have held a plaintiff can demonstrate causation, that is, that the plaintiff's speech was a substantial factor in the adverse employment actions taken against him by producing evidence that the actual decisionmaker was influenced by subordinate employees who took offense at the content of Plaintiff's speech. In those situations, these circuits have held such evidence is sufficient to satisfy the causation element of a First Amendment claim. *See Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004); *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003); *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876 (9th Cir. 2003); *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001); *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999); *Saye v. St. Vrain Valley School Dist. RE-1J*, 785 F.2d 862 (10th Cir. 1986). The Eighth Circuit's decision is in direct conflict with the Fourth, Sixth, Ninth and Tenth Circuits. The inter-circuit conflict created by the Eighth Circuit's opinion about this important issue further warrants review by the Court.

In *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), a case on all fours with Dr. Howard's case, the Fourth Circuit held that a rational jury could base a finding that

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[9] Howard respectfully requests this Court to hold her Petition so that it can be discussed in conference along with *Hill*.

speech was a motivating factor in the school district's decision to remove Love-Lane from her assistant principal position, when the removal was based upon complaints from teachers who took offense at the content of Love-Lane's speech opposing discriminatory practices against African-American and poorer students in her elementary school. In that case, Love-Lane observed teachers engaging in discriminatory practices, including discriminatory discipline, a disproportionate number of African-American students repeatedly sent out of classrooms, excluded from class trips, and students not being given adequate instruction. Love-Lane voiced her concerns at faculty and school improvement meetings that the teachers' discriminatory practices placed African-American and poorer students at a disadvantage. Several of the invidiously motivated teachers resented Love-Lane bringing up these issues and banded together against Love-Lane. They complained to the principal, requesting that another administrator be assigned for the rest of the year. This same group of teachers also exerted their influence by going to the superintendent and complaining about their difficulties in working with Love-Lane. As a result of the complaints, Love-Lane was removed from her principal position and demoted to a teaching position. The reason given by the superintendent was poor working relationships with the principal and staff. The District Court granted summary judgment to the school district. The Fourth Circuit reversed, holding summary judgment was not appropriate because the causal facts were in dispute. The Court concluded Love-Lane had raised a genuine issue of material fact as to whether she was removed and demoted in retaliation for her speech, that Love-Lane proffered sufficient circumstantial evidence to demonstrate that her protected speech was a substantial factor in the removal and demotion decisions.

In *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), Peters' contract as director of the school district's gifted program was nonrenewed after she complained about discrimination against black students and advocated for a racially equitable gifted program. The district's superintendent reprimanded Peters because there was a "great deal of . . . unrest in the gifted and talented community," that she was stirring up parents and causing problems. She continued to speak out and months later the Board of Education voted to nonrenew Peters' contract relying upon the Superintendent's recommendation of termination because she "caused divisions and controversy in the program." The district court granted summary judgment to the school district. The Fourth Circuit vacated the district court's entry of summary judgment, holding sufficient evidence existed to survive summary judgment regarding the necessary causal connection between Peters' advocacy and the nonrenewal of her contract. The Fourth Circuit relied in particular on evidence that Peters' communications with parents, principals, and teachers was among the superintendent's specifically enumerated reasons for recommending Peters' termination.

Similarly, in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), the Sixth Circuit held that a reasonable jury could find causation existed based upon the substantial influence that teacher and parent complaints had on the district decisionmakers who terminated Cockrel's teaching contract. In that case, Cockrel was terminated because of her decision to teach students about the environmental benefits of industrial hemp. Numerous faculty, staff, parents and the PTA protested to the principal and superintendent, including writing letters opposing Cockrel's speech. The principal issued a summative evaluation to Cockrel noting deficiencies in communication with parents and inability to build positive relationships within the school. Attached to the evaluation were several letters from parents complaining about Cockrel's discussion of hemp in class. Based upon the principal's evaluation, which was based upon the complaints about Cockrel's

speech, the superintendent recommended Cockrel's termination to the board. The district court granted summary judgment. The Sixth Circuit reversed concluding Cockrel presented enough evidence such that a reasonable jury could find that the district, in terminating her, was motivated by her speech.

In *Saye v. St. Vrain Valley School Dist. RE-1J*, 785 F.2d 862 (10th Cir. 1986), the Tenth Circuit held in a situation where the individual who had retaliatory motive was in a position to influence the decision to terminate an employee, this evidence was sufficient to establish causation in a §1983 case. In this case, Saye's teaching contract was terminated. She alleged her termination was in retaliation for her activities as faculty representative for the district's education association. The Sixth Circuit noted in finding that causation existed, that the most important factor the superintendent considered in recommending termination to the Board was the principal's recommendation. 785 F.2d at 867.

In *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876 (9th Cir. 2003) and *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), the Ninth Circuit addressed the issue of a biased subordinate's influence in the process of terminations of employees in the context of §1983 actions, where the employees were claiming the terminations were motivated by retaliation for their protected speech. In both of those cases, the Ninth Circuit held the requisite causal connection for liability is established when the person(s) who sets in motion the chain of events that led to plaintiffs' terminations, was motivated to retaliate against plaintiffs for their protected speech.

In the Third Circuit, even a recommendation of dismissal can fatally taint the decision of the decision-maker when it is based on a recommendation from a biased subordinate. In *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265 (3rd Cir. 2001), a Title VII retaliation case, Abramson was denied tenure. The decision to deny tenure had been made by the college

president based upon input he sought from the dean who was anti-Semitic. The dean recommended against tenure. The Third Circuit held that causation is established, "if those exhibiting discriminatory animus influenced or participated in the decision to terminate." 260 F.3d at 286. The Court noted the college president "did not make his decision in a vacuum. A reasonable inference could be drawn that [the president] was influenced by [the dean]." 260 F.3d at 285.

This type of evidence is especially relevant when a Plaintiff, such as Dr. Howard, challenges the motive behind the employment decision. *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308 (D.C. Cir. 1998) ["Evidence of a subordinate's bias is relevant where the ultimate decisionmaker is not insulated from the subordinate's influence." 142 F.3d at 1312]. The Eighth Circuit's decision in this case is at odds with the Third, Fourth, Sixth, Ninth and Tenth Circuits. The conflict in the circuits created by the Eighth Circuit's opinion further warrants review by the Court. Had Dr. Howard's case arisen in the Third, Fourth, Sixth, Ninth and Tenth Circuits, the result would have been very different: summary judgment would not have been granted because those circuits recognize that a Plaintiff in a §1983 case can demonstrate causation by producing evidence that the actual decisionmaker was influenced by biased subordinate employees, who took offense at the content of the Plaintiff's speech. The Eighth Circuit's decision permits public employers to punish those employees who have engaged in protected speech, by relying solely on third party reports from prejudiced subordinates. Without guidance from this Court, the confusion among the lower federal courts will continue to lead to inconsistent treatment of a plaintiff's evidence to establish causation in §1983 First Amendment cases. Such inconsistent treatment involves the risk of erroneously punishing protected speech. Permitting the lower court's decision to stand creates a danger that employees' rights to freedom of speech will be abridged in violation of the First Amendment.

QUESTION TWO

IN §1983 FIRST AMENDMENT CASES, IS SUMMARY JUDGMENT PRECLUDED WHERE QUESTIONS REGARDING AN EMPLOYER'S MOTIVE PREDOMINATE IN THE INQUIRY REGARDING HOW IMPORTANT A ROLE THE PROTECTED SPEECH PLAYED IN THE EMPLOYMENT DECISION?

II. Review is Warranted Because the Eighth Circuit's Decision Is In Direct Conflict With Both Circuit Court Decisions and Previous Eighth Circuit Decisions, and This Court's Decision In *Mt. Healthy City Board of Education v. Doyle* Does Not Address The Questions In Which the Lower Courts Are In Conflict

A. The Eighth Circuit's Decision Is in Direct Conflict with Circuit Court Decisions Which Have Addressed This Question in §1983 Cases

In order to establish a First Amendment free speech claim, pursuant to §1983, this Court's decision in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) requires a Plaintiff to produce evidence which would create a triable issue of fact that his speech was a substantial or motivating factor to the adverse employment action taken against him. However, in order for the factfinder to determine whether the speech was a substantial or motivating factor, there must be an examination of the facts to determine *the extent* that the employer's motive predominates in the inquiry regarding how important a role the protected speech played in the adverse employment decision. In other words, in those cases where a Plaintiff's speech is inextricably linked to the employer's articulated reason for the adverse employment action, this creates a factual issue for the trier of fact, precluding summary judgment.

The lower court's decision did not address the issue of motivation raised by Dr. Howard, that is, that the Respondent's reasons for the adverse employment actions were inextricably linked to Dr. Howard's speech. Instead, the lower court improperly made a factual finding that Respondents removed Dr. Howard because of "tension among faculty and low morale" (App. 8a), while disregarding Dr. Howard's evidence that the cause of the tension was a consequence of her protected speech. Dr. Howard's evidence was relevant and should have been considered because it directly raised a factual issue as to *the extent* her speech played a role in the Respondents' employment decisions taken against her, said evidence, which precluded summary judgment.

The lower court's disregard of Dr. Howard's evidence as to the extent her speech played a role in the adverse employment actions taken against her directly conflicts with the Second, Fourth and Sixth Circuits, which all follow the general principle of law that if the speech is inextricably linked, such evidence creates a genuine issue of fact as to causation and summary judgment cannot be granted. See *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004); *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003); *Leary v. Daeschner*, 349 F.3d 888 (6th Cir. 2003); *Cockrel v. Shelby County School District,* 270 F.3d 1036 (6th Cir. 2001); *Morris v. Lindau*, 196 F.3d 102 (2nd Cir. 1999) ["The appropriateness of summary judgment should be analyzed under the principle that summary judgment is inappropriate when "questions of motive predominate" in the inquiry about the role the protected behavior played in the employment decision]." 196 F.3d at 111. See also *Piesco v. City of New York*, 933 F.2d 1149, 1155 (2nd Cir. 1991) [Summary judgment should be precluded where there are questions regarding the employer's motive in the adverse employment decision]; *Hickman v. Valley Local Sch. Dist. Bd. of Ed.*, 619 F.2d 606 (6th Cir. 1980).

In *Hickman v. Valley Local Sch. Dist. Bd. of Ed.*, 619 F.2d 606 (6th Cir. 1980), the Sixth Circuit held that a

teacher's speech was a motivating factor because her speech was inextricably linked to the employer's reason for her dismissal. Plaintiff alleged her contract was nonrenewed because of her union activities in violation of her First Amendment rights. The District alleged it nonrenewed Plaintiff's contract because of a personality conflict. The Sixth Circuit found the two reasons were inextricably linked to the antagonism generated from Hickman's union activities, that the personality conflict was a consequence of her protected conduct. The Sixth Circuit stated, "to allow any rancorous feelings engendered in this manner to justify a dismissal would decimate constitutional protections." 619 F.2d at 609.

Similarly, in *Leary v. Daeschner*, 349 F.3d 888 (6th Cir. 2003), the Sixth Circuit held summary judgment was precluded where the Plaintiffs' speech was inextricably linked to the employer's reason for the adverse employment actions. In this case, two teachers, who were transferred from their school alleged the transfers were because of their speech. The Court considered Plaintiffs' evidence of the connection between their speech and the transfers. The Court held Plaintiffs' evidence that they were transferred because they were "too vocal," and the employer's reason Plaintiffs were transferred because they were not "team players," involved issues of fact connected to their speech, thus creating genuine issues of material facts to be resolved by the trier of fact, and thus summary judgment was inappropriate. 349 F.3d at 902-903.

The Eighth Circuit's decision is at odds with the Second, Fourth and Sixth Circuits. All of these cases involve facts similar to Dr. Howard's case and if her case had been brought in those circuits, summary judgment would not have been granted, because those Circuits do permit an inquiry into the extent a plaintiff's speech played in the adverse employment decision. The conflict in the Circuits created by the Eighth Circuit's opinion further warrants this Court's review in order to maintain uniformity in the lower courts' decisions.

B. The Eighth Circuit's Decision in This Case Is in Direct Conflict with Previous Eighth Circuit Decisions

The lower court's opinion completely disregards its own prior precedent in §1983 First Amendment cases involving public school employees. In those cases, the lower court held that if the protected speech is inextricably linked to the adverse employment action, such evidence creates a genuine issue of fact which precludes summary judgment. *Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991) ["If Stever's 'agenda' involved compliance with state immunization requirements, interpersonal friction arising therefrom cannot justify her transfer . . . because it is inextricably linked with her protected speech"], 943 F.2d at 853; *Roberts v. Van Buren Public Schools*, 773 F.2d 94 (8th Cir. 1985) [Decline in plaintiff's evaluation marks could not be used to justify her dismissal insofar as lower scores could be traced to supervisor's disapproval of plaintiff's union activities]; 773 F.2d at 958 n. 6; *Patterson v. Masem*, 774 F.2d 251 (8th Cir. 1985) [Plaintiff's perceived lack of interpersonal skills due to abrasiveness and antagonism she engendered among peers could not be legitimate factor justifying refusal to promote if peers' antagonism resulted from their disagreement with plaintiff's civil rights activism]. 774 F.2d at 256. As a result of the lower court disregarding its own precedent, it has negated those decisions. The Eighth Circuit's refusal to follow its own precedent warrants this Court's review in order to maintain uniformity in the lower courts' decisions.

C. This Court's Decision in *Mt. Healthy City Board of Education v. Doyle* Does Not Address The Questions Presented in This Case on Which the Lower Courts are in Conflict

While this Court's decision in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) requires an

employee to present evidence that the employee's speech was a substantial or motivating factor, the opinion does not address the types of evidence sufficient to establish causation.[10] Since *Mt. Healthy* has been decided, many years have gone by and there has been much discussion and debate among the courts as to the types of evidence which would be sufficient to establish causation, resulting in different results creating conflicts and confusion among the Circuits. This Court has not addressed the two questions present in this case. *Mt. Healthy* did not address the issue of whether summary judgment can be granted when the employee's speech is inextricably linked to the employer's articulated motivation for the adverse employment action. Nor did *Mt. Healthy* address the question of liability when a prejudiced subordinate's influence plays a substantial role in the actual decisionmaker's decision to take adverse employment action against a public employee.

It is critical these two evidentiary questions be addressed by the Court. The questions are important in that evidentiary and proof requirements under 42 U.S.C. § 1983 raise important questions of federal law. As the lower court's decision stands in this case, it permits federal courts to improvidently grant summary judgment when there are genuine issues of fact as to motivation and causation. For this reason, review is warranted in order to resolve the conflicts among the Circuits and to provide guidance to the lower courts as to the proper evidentiary standards for analyzing the types of evidence which are sufficient to establish causation, in order to create a genuine issue of fact which will defeat summary judgment.

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[10] The lower court's opinion does not even acknowledge the Court's decision in *Mt. Healthy*.

III. Review is Warranted Because the Lower Court's Decision is Erroneous on its Merits and Calls for an Exercise of this Court's Supervisory Power

The lower court's decision in this case is shockingly wrong. The decision is erroneous for three reasons: First, because the lower court grossly misapplied the standards this Court has set out in reviewing evidence for summary judgment purposes; second, because the lower court's opinion disregards Dr. Howard's substantial evidence of motivation, which other Circuits have held is sufficient to establish causation; and three, because the lower court improperly engaged in determining issues of fact normally reserved for the factfinder and not the court, in effect substituting its own judgment for that of a jury. The lower court's conclusion about the sufficiency of the evidence as to motive and causation reflects a failure by the lower court to view the facts and all reasonable inferences to be drawn therefrom in the light most favorable to Dr. Howard, disregarding any facts which a factfinder is not required to believe. The lower court's analysis is completely contrary to the standards established by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 122 (2000) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The lower court's decision also disregards this Court's decision in *Hunt v. Cromartie*, 526 U.S. 541 (1999), where the Court held it is error for a lower court to resolve the issue of motivation and intent at the summary judgment stage.

The lower court's opinion is such a departure from the usual course of judicial proceedings that the Court should exercise its supervisory powers and reverse the lower court's decision.

IV. Petitioner's Intent to Raise Additional Issues

Should this Court grant Howard's Petition for Writ of Certiorari, Howard intends to raise in her brief the additional issues as to her equal protection claim pursuant to 42 U.S.C. §1983 and the issue of qualified immunity as raised by Respondents Ritter and Cozette.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals.[11]

Respectfully submitted,

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August 2004

[11] In the alternative, should this Court grant certiorari in *Hill v. Lockheed Martin Logistics Management, Inc.*, Case No. 03-1443, Howard respectfully requests the Court to hold her petition and postpone consideration of the petition until *Hill* has been decided and then make summary disposition of the case in accordance with that decision.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-1882

Karol K. Howard, Appellant, v. Columbia Public School District; James R. Ritter, individually and in his official capacity as the Superintendent of the Columbia Public Schools; Cheryl Cozette, individually and in her official capacity as Assistant Superintendent of the Columbia Public Schools, Appellees.	*	Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 12, 2004

Filed: April 13, 2004

Before WOLLMAN, RICHARD S. ARNOLD, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

WOLLMAN, Circuit Judge.

Karol K. Howard appeals from the district court's[1] grant of summary judgment in favor of defendants on each of her claims, asserting that there exist genuine issues of material fact to be resolved by a jury. After de novo review and examination of the voluminous record, *Turner v. Honeywell Fed. Mfg. & Techs., L.L.C.*, 336 F.3d 716, 719-20 (8th Cir. 2003), we affirm.[2]

I.

Dr. Howard was hired in 1998 to be a principal at Robert E. Lee Elementary School (Lee) in the Columbia, Missouri, Public School District, where she served for two years. Dr. Cheryl Cozette, Deputy Superintendent of Elementary Education for the district, supervised and evaluated the elementary school principals in the district and frequently communicated with Howard via email and in person about how things were going at Lee. Howard often asked Cozette for advice on how to deal with particular situations she encountered in working with certain teachers. In monthly meetings with all the principals, Cozette discussed with and encouraged them to implement both the district-wide literacy plan, initiated in the 1999-2000 school year, and each individual school's improvement program.

Towards the end of Howard's second year at Lee, tensions among Lee staff, previously unknown to district-wide leadership, reached a head. Upon receiving a series

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[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

[2] Appellees' motion to strike appellant's reply brief is denied.

of letters expressing concern about the tension at Lee due to Howard's leadership (a letter from a "concerned citizen," a letter signed by seventeen faculty who had worked at Lee the previous year, a letter from the PTA president, two letters from concerned parents, and a resignation letter from a Lee teacher stating that she could no longer work under Howard), the District Superintendent, Dr. James Ritter, and Cozette took steps to investigate the situation. Cozette met with Howard several times to discuss the situation at Lee, expressing concern about Howard's communication and interpersonal relationships with Lee teachers. Howard wrote a detailed letter in response, in which she described all the achievements and improvements that had occurred at Lee under her leadership. The letter did not address possible causes for the tension among faculty or present ideas for improving the situation.

A week later, Cozette met with several of the Lee teachers who had signed the faculty letter to hear their concerns in more detail. Two days later, Cozette met with Howard again and indicated that she did not think Howard would be successful at Lee, given the scope of the discontent among the teachers. Cozette and Ritter met with Howard in July 2000 to discuss a district-wide position in grant writing and data analysis that had been created for Howard and which provided the same salary and benefits as her principalship at Lee. Howard worked in the newly-created position for three days, though she never signed or returned the contract. On the advice of her attorney, she then returned to her former office at Lee, claiming that she was still the rightful principal there. To eliminate the awkward situation for the new administration at Lee and allow for further negotiations, the district temporarily placed Howard on paid administrative leave.

It then placed Howard in a newly-established "Principal on Special Assignment" position for the 2000-2001 school year at Blue Ridge Elementary School. Howard performed her duties in this position for the year and was given notice on April 10, 2001, that she would not be rehired as principal for the following year. Although Howard applied for several other principal positions within the Columbia Public School District, she was not hired to fill any of them.

Howard filed a complaint in district court in August 2001, alleging several constitutional violations under 42 U.S.C. § 1983 (freedom of speech, procedural due process, substantive due process and equal protection), as well as alleging several state law claims (tortious interference with contract, breach of contract, and violations of district policy and state law). She sought, among other things, reinstatement, lost wages and other benefits, attorneys' fees, and a clear record. Following nearly a year of discovery, defendants filed a motion for summary judgment on all counts. Howard filed objections and a motion for partial summary judgment. The district court granted summary judgment on the merits of each of the constitutional claims under 42 U.S.C. § 1983 for the school district and on qualified immunity grounds for Ritter and Cozette. It also granted summary judgment to Ritter and Cozette on each of the state law claims against them. This appeal followed.

II.

We review a motion for summary judgment in the same manner as that utilized by the district court and affirm if there is there is no issue of material fact and defendants are entitled to judgment as a matter of law.

Allen v. City of Pocahontas, 340 F.3d 551, 554-55 (8th Cir. 2003). Although we view the facts in the light most favorable to the non-moving party, we do not accept unreasonable inferences or sheer speculation as fact. *See Mole v. Buckhorn Rubber Prods., Inc.,* 165 F.3d 1212, 1218-19 (8th Cir. 1999). The moving party bears the burden to demonstrate that there is no issue of material fact. The plaintiff may not then simply point to allegations made in her complaint but must identify and provide evidence of "specific facts creating a triable controversy." *Jaurequi v. Carter Mfg. Co.,* 173 F.3d 1076, 1085 (8th Cir. 1999). Simply providing a massive record does not satisfy this burden, and we will not sort through a voluminous record in an effort to find support for the plaintiff's allegations.[3] *Crossley v. Georgia-Pacific Corp.,* 355 F.3d 1112, 1113-14 (8th Cir. 2004) (per curiam). *See also Johnson v. City of Shorewood,* Nos. 02-3562/4081/03-2023, 2004 WL 405692, at *6 (8th Cir. Dec. 18, 2003) ("It is not a court's obligation to search the record for specific facts that might support a litigant's claim[.]"). We consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consist of hearsay, or purport to state legal conclusions as fact. *See Shaver v. Independent Stave Co.,* 350 F.3d 716, 723 (8th Cir. 2003); Fed. R. Civ. P. 56(e). We examine each of Howard's claims in the light of these considerations.

Defendants Ritter and Cozette have asserted the defense of qualified immunity, a defense that enables government officials to avoid the compulsion to stand trial.

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[3] Howard's appendix contains some 3,158 pages of material.

Saucier v. Katz, 533 U.S. 194, 200 (2001). In evaluating a claim of qualified immunity, we ask the threshold question of whether the facts alleged show that the official's actions violated a constitutional right. *Id.* at 201. If no constitutional right would have been violated had the alleged facts been established, "there is no necessity for further inquiries concerning qualified immunity." *Id.*

A.

Howard alleges that Cozette, Ritter and the district violated her first amendment right to freedom of speech when they removed her from her position as the principal at Lee. She contends that their actions were motivated by her speaking out in favor of aggressive literacy training and against the exclusionary treatment of minority, disabled, disadvantaged, and special needs children.

A school district may not fire an employee because he or she has spoken critically of the school on a matter of public importance. *Pickering v. Board of Educ.,* 391 U.S. 563, 574 (1968). To establish such a claim, the plaintiff must demonstrate that she has engaged in protected speech (speech on a matter of public concern), that her interest as a citizen in commenting on the issue outweighs the public employer's interest in promoting efficient public service, and that her speech was a motivating factor in the action taken against her. *See Calvit v. Minneapolis Pub. Sch.,* 122 F.3d 1112, 1116 (8th Cir. 1997); *Meyers v. Neb. Health & Human Serv.,* 324 F.3d 655, 659 (8th Cir. 2003).

Howard cannot succeed on her first amendment claim because she has failed to present any evidence that her speech motivated defendants to terminate her employment. For the purposes of this appeal, we will assume, as

did the district court, that Howard's speech involved a matter of public concern. The mere fact that Howard engaged in protected conduct, however, is "not sufficient to give rise to an inference of causation." *Allen,* 340 F.3d at 555. Some factors that are probative, though not conclusive, of causation, are the timing of the adverse employment action and any evidence of statements made by the defendants with reference to the protected activity. *See Meyers,* 324 F.3d at 659 (finding an issue of material fact as to causation because the employment action occurred shortly after the speech and was accompanied by comments that supported the inference); *Calvit,* 122 F.3d at 1118-19 (noting that Calvit's reports about the school's child abuse policy were closely followed by a series of negative employment actions); *Allen,* 340 F.3d at 555-56 (stating that the significant time lapse between protected conduct and the adverse action could preclude a finding of causation).

Howard's evidence does not give rise to a reasonable inference of causation. She claims that because she initially received favorable reviews and because defendants were aware that she was focused on student improvement, her removal evidences causation. Her surmise to this effect is insufficient to establish a genuine issue of fact, however. When asked why she believed that Ritter and Cozette were motivated by her speech, she replied, "there's no other logical reason" and "He might not have liked what he read in [my principal's report]." These responses reflect pure speculation on Howard's part. In addition, in making these unwarranted inferential leaps, Howard ignores undisputed evidence that actually leads to the opposite conclusion. Howard acknowledges, for example, that the district advocated the same goals of literacy and

educational improvement that she claims her advocacy of resulted in her termination. She also acknowledged during her deposition that when she spoke with Cozette about concerns involving various teachers, she did not specifically mention minority, special needs, and disadvantaged students, contending only that her mention of "students" impliedly included disadvantaged students. She provides no evidence to counter defendants' evidence that they removed her because of the tension among faculty and low morale under her leadership, but merely denies any faults in her leadership. Such claims are insufficient as a matter of law to create a genuine issue of material fact.

B.

Howard also contends that defendants deprived her of both liberty and property interests without due process of law. We conclude that Howard has not established a genuine issue of material fact as to either of these claims.

To survive summary judgment on her liberty interest procedural due process claim, Howard must provide evidence that the school district made public accusations about her behavior and her subsequent change in employment "that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges." *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994). The stigma must be significant, and it usually involves allegations of dishonesty, immorality, racism, or a similar character-demeaning charge. *Id. See also Putnam v. Keller,* 332 F.3d 541, 546 (8th Cir. 2003).

In attempting to make her claim, Howard refers to several pieces of evidence. She alleges that Cozette

described her as "bizarre," a mischaracterization of a statement in which Cozette shared with a friend her thought that the situation in which she found herself in relation to Howard was "bizarre." Howard also cites Ritter's August 21, 2000, memorandum to the Board of Education outlining the process of Howard's reassignment and describing his reasoning in concluding that Howard would not be able to provide positive leadership at Lee. This memorandum was not a public document, and it was sent to inform the Board of the change in district-wide positions and principalships. *See* Columbia Board of Education Rules and Regulations (Board Rules) GCA. The only public document related to Howard was a newspaper article about her district-wide position as grant writer. While Howard claims that the article stigmatized her, it in fact describes her in positive terms, emphasizing her skills as a grant writer.

Howard has failed to establish that defendants said anything that can in any way be characterized as stigmatizing, for a well-founded expression of concern about a school principal's leadership abilities cannot be held to be such. It is essential that a public employer be able to conduct an internal evaluation of an employee's effectiveness and skill, and thus an employee may not claim that a critical, fact-based review and evaluation of relevant job skills is by and of itself stigmatizing.

To survive summary judgment on her property interest procedural due process claim, Howard must provide evidence that she had a reasonable and legitimate expectation of continued employment. Her subjective and "unilateral expectation" that she had "a legitimate claim of entitlement" to continue as a principal in the Columbia School District is not sufficient. *See Board of Regents of*

State Coll. v. Roth, 408 U.S. 564, 577 (1972). We look to Missouri law and the terms of her employment to determine whether Howard's interest in her job as principal rises to the level of a constitutionally protected property right. *See Id.*. "Historical employment practices" may create a legitimate expectation, but such practices must be grounded in a "mutually explicit understanding." *Cross v. Hammonds,* 223 F.3d 867, 868 (8th Cir. 2000). In this case, there is insufficient evidence of any historical employment practice to create an issue of material fact. We agree with the district court that Howard's assertion to the contrary is insufficient to negate the provisions of state law.

Under Missouri law, and as reflected in the Board's rules, a principal's employment status is governed by the statute applicable to "certificated teachers ineligible for permanent status." *McCormack v. Maplewood-Richmond Heights Sch. Dist. Bd. of Educ.,* 935 S.W.2d 703, 709. (Mo. App. 1996) (stating that principals are governed under Mo. Ann. Stat. § 168.101). *See also* Board Rules GCPD at 3. Although the position of principal can never be a tenured one,[4] *McCormack,* 935 S.W.2d at 709, a principal

[4] Under Missouri law, a principal may not gain permanent status or tenure in her position as principal. A principal may be entitled to additional process, however, if she has been reemployed by the district for five or more years. She would then be entitled to the additional process of a list of reasons and a hearing in the case of non-renewal. Mo. Ann. Stat. § 168.101(6) (2004); Appellee's App. at 281-82. A principal may have tenure as a permanent teacher while she is a principal, but she may only be entitled to retain employment in that district as a teacher, not as a principal. *Elrod v. Harrisonville Cass R-IX Sch. Dist.,* 706 S.W.2d 465, 470 (Mo. App. 1986); Mo. Ann. Stat. § 168.104 (2004). Howard was tenured as a teacher in Iowa, but not in Missouri. She has not asserted a right to a teacher position, but asserts that she is entitled to a principal position.

is entitled to an expectation of continuing employment the following year if she does not receive notice of non-renewal by April 15. Likewise, a principal has a property interest in the employment period specified in the contract. *McCormack,* 935 S.W.2d at 708.

Because she was employed as a principal in Missouri for only three years (two years at Lee, one year at Blue Ridge), Howard had no tenure rights. None of her one-year contracts made any promises of further employment. Accordingly, she had no right to additional procedural protections in the event of non-renewal.

Howard alleges two due process violations resulting from changes in her employment status. The first of these occurred when she was reassigned to the district-wide position and then to the Blue Ridge position.

Howard had a valid expectation of re-employment under the terms of her prior contract because the problems arose at Lee after the April 15 date had already passed. The contract did not specify that the employment was for Lee, however, so any principalship within the district would fall within the contract's terms. Whether Howard's reassignment to the district-wide position as grant writer was contrary to her entitlement is an issue we need not resolve, because Howard, after ultimately rejecting that position, negotiated a contract for a position as a principal at Blue Ridge. The Blue Ridge contract was substantially the same as her prior contracts at Lee, thus satisfying Howard's statutory expectation of continued employment.

Howard's second claimed due process violation –the failure to renew her Blue Ridge principalship – is without merit, for she received notice before April 15 of that school

year that her contract would not be renewed, which was all the process she was due.

In sum, then, Howard's procedural due process claims are without merit, and the district court correctly granted defendants summary judgment on them.

C.

Howard contends that she suffered two substantive due process violations. The first claimed deprivation – that of her right to engage in her occupation as an educator – was not raised below, and we will therefore not consider it on appeal. *See First Union Nat'l Bank v. Pictet Overseas Trust Corp.,* 351 F.3d 810, 816 (8th Cir. 2003). Her second claimed violation – that the stigmatizing conduct prevented her from being able to clear her name and get a job – was at least arguably raised in the district court. We conclude that the claim is without merit, for in light of our holding that Howard was not subjected to any stigmatizing conduct or comments, there perforce was no conduct on defendants' part that could even arguably be said to rise to the level of that which is sufficient to state a substantive due process violation claim. *See Moran v. Clarke,* 296 F.3d 638, 644-45 (8th Cir. 2002) (en banc).

D.

Howard contends that she was treated less favorably than other principals within the district and thus was denied her fourteenth amendment right to equal protection. She argues that because other principals who were accused of poor leadership were given the opportunity for improvement and were either transferred or rehired, the

district effectively established a policy of providing such a probationary period. We conclude that even if Howard has identified similarly situated principals who were under scrutiny for matters of "comparable seriousness," *see Warren v. Prejean,* 301 F.3d 893, 903 (8th Cir. 2002), her equal protection claim nevertheless fails, for she has not come forward with evidence sufficient to raise an issue of material fact on whether defendants acted for a discriminatory reason. *See Keevan v. Smith,* 100 F.3d 644, 651 (8th Cir. 1996). Howard's claim that she was treated differently because of her speech fails for the same reason that her first amendment violation claim failed. Her unfounded allegation does not trump the rational explanation defendants have given: that they based their decision on the numerous complaints of tension, low morale, and poor leadership during Howard's tour of duty at Lee.

E.

We conclude that Howard's Missouri state law tort and contract claims are also without merit. She brought claims against Ritter and Cozette for tortious interference with contract and breach of contract. The elements of tortious interference with contract are: "(1) the existence of a contract, (2) defendant's knowledge of the contract, (3) that defendant induced or caused the breach of contract, (4) that the defendant's acts were not justified, and (5) that the plaintiff thereby suffered damages." *Franklin v. Harris,* 762 S.W.2d 847, 848 (Mo. App. 1989) (citing *Lick Creek Sewer Sys. v. Bank of Bourbon,* 747 S.W.2d 317, 322 (Mo. App. 1988)). Because Ritter and Cozette were Howard's supervisors, presumptively acting in their official capacities and within the scope of their duties, Howard must prove that malice was the reason for the acts in

order to show that the acts were not justified, *Franklin,* 762 S.W.2d at 849, something she has not done. Howard's breach of contract claim is based on a breach of the implied covenant of good faith and fair dealing that is included in every Missouri contract. *Acetylene Gas Co. v. Oliver,* 939 S.W.2d 404, 410 (Mo. App. 1996). To prove such a breach, there must also be substantial evidence of bad faith. *Id.* As we have already stated, Howard has provided no evidence beyond her "feeling" that Ritter or Cozette were motivated by a desire to injure her or that they harbored ill-will toward her. In the absence of such proof, this claim too must fail.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

KAROL K. HOWARD, Plaintiff,	)	
v.	)	Case No. 01-4157-CV-C-NKL
COLUMBIA PUB. SCH. DIST., *et al.*, Defendants.	)	

ORDER

Plaintiff, Dr. Karol K. Howard ("Howard") was employed by the Defendant, Columbia Public School District ("the District") for three years. When the District didn't renew her employment contract, she filed this lawsuit claiming that she had been retaliated against because she spoke out about the treatment of minorities, disadvantaged students, and special education students in the District. Howard also claims that her Equal Protection and Due Process rights were violated and the District breached its contract with her. Finally, she seeks administrative review of the District's decision to not renew her employment contract. In addition to the District, the Defendants in this case are: Dr. James Ritter ("Ritter"), Superintendent of the Columbia Public School District; and Dr. Cheryl Cozette ("Cozette"), Assistant Superintendent of Schools for Elementary Education of the Columbia Public School District. Cozette was Howard's immediate supervisor at the District and Ritter was responsible for overseeing the operations of the schools within the District.

Pending before the Court is the Defendants' Motion for Summary Judgment [Doc. # 193] and several miscellaneous motions relevant to that motion. For the following reasons, the Defendants' Motion for Summary Judgment is granted. Also pending before the Court is Howard's Motion for Partial Summary Judgment [Doc. # 194]. Howard's motion is denied.

I. Summary Judgment Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). The main purpose of a motion for summary judgment is to identify factually unsupported claims. If a plaintiff has the burden of proof at trial on a claim and the defendant has filed a motion for summary judgment, the plaintiff must identify admissible evidence sufficient to make a submissible case at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the plaintiff cannot identify such facts, the defendant is entitled to judgment as a matter of law. *Lujan v. Nat'l Wildlife Fed'n*,

497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322)).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 248.

II. Factual Background

Solely for the purpose of the Defendants' Summary Judgment Motion, the Court views the facts in a light most favorable to Howard, accepting as true Howard's version of the facts when they are disputed. Due to the voluminous record, the Court briefly recounts the facts in this section and expands on the facts when needed in the following sections of the Order.

In July 1998, the District hired Howard as a principal and assigned her to Robert E. Lee Elementary School ("Lee"). (Howard Dep. p. 60; Ex. C).[1] She was principal at Lee for the 1998-1999 and 1999-2000 school years. (Ex. C). During these two years, Howard was employed by the District under one-year administrator contracts. (Ex. C; Howard Dep. pp. 61-64). As a principal, Howard performed administrative and supervisory duties throughout her employment with the District, she was never employed as,

[1] Exhibits with alphabetical designations were filed by Defendants. Exhibits with numerical designations were filed by Howard.

and did not perform the duties or responsibilities of, a teacher or instructor. (Def. Statement of Facts ("SOF") ¶ 13-16).

Howard has the necessary education, licenses, and certification for the position of principal. (Pl. SOF ¶ 16-22). Prior to being principal at Lee, Howard was the elementary principal at Southern Cal Community School District. Howard has also been a band instructor/music teacher. However, Howard has not been employed as a teacher for five successive years at the District or any other school district in Missouri. (Ex. E; Ex. F).

During the 1998-99 school year, Cozette did two observations and one evaluation of Howard. Cozette did two observations in the 1999-2000 school year. Generally, Cozette's evaluations concluded that Howard met the District's expectations.

While Howard was principal, there were 325 students at Lee and 48% of them qualified for free and reduced lunch rate. (Cozette Dep. p. 335-36). Test scores suggest that there are wide achievement gaps in the test scores of minority, special needs, and disadvantaged students versus non-disadvantaged students. (Pl. SOF ¶ 61-73). To address these issues, the District has a School Improvement Program and District Literacy Plan which is frequently discussed with the public, teachers, and administrators. (Def. SOF ¶ 21-47).

During the 1999-2000 school year the District started to implement its Literacy Plan. (Ballenger Dep. p. 54). Howard extensively discussed the need to work on improving the education of disadvantaged, minority, at-risk, and special education students throughout the year. These discussions occurred at faculty and staff meetings (particularly during

February, March, April, and May 2000); individual meetings with Lee teachers and meetings with Cozette regarding Howard's professional growth plan and evaluations. (Pl. SOF ¶ 334, 336-78).

Initially, the District planned for Howard to be the Lee principal for the 2000-2001 school year. However, in the late spring/early summer several issues concerning Howard's experience at Lee the previous year came to the attention of Cozette and Ritter. Cozette met with Howard to address some concerns on June 13, 2000, June 16, 2000, and June 28, 2000. (Ex. BT; Ex. BU; Cozette Dep. p. 379, 452-53; Cozette Aff. ¶ 70, 99-100; Howard Dep. pp. 312, 357-58, 363-64). The concerns discussed at these meetings included written complaints, letters from parents, a teacher resignation, a Lee faculty agenda dated May 5, 2000, and a written document titled "personal issues." See Section III.A. below for more detail.

On July 11, 2000, both Cozette and Ritter met with Howard to discuss the conflict between Howard and the Lee teachers. (Cozette Dep. pp. 392-96, 460-61; Ritter Dep. pp. 82, 92, 158-60, 255-57; Howard Dep. p. 437; Cozette Aff. ¶ 106; Ritter Aff. ¶ 65). In this meeting, Ritter discussed a new data analyst/grant writing position with Howard. Ritter believed that Howard had skills in the area of grant writing and data analysis and wanted Howard to assume the new district-wide assignment. The reassignment carried the same salary and benefits she had at Lee and was for the same number of days. Her supervisor would continue to be an Assistant Superintendent. An interim principal was to be appointed at Lee.

On August 7, 8, and 9, 2000, Howard reported to the data analyst/grant writing position. (Ex. CI; Howard Dep.

p. 498). On August 10, 11, and 14, 2000, Howard sat in an office at Lee reading a book while the interim principal worked. When Dr. Marjorie Spaedy, the Deputy Superintendent for Administration, talked with Howard about why she was sitting at Lee and not at her new position, Howard informed Spaedy that she was not happy with the position. (Howard Dep. p. 504-06; Spaedy Aff. ¶ 13, 15). While the situation with Howard's position was being resolved, Howard went on paid administrative leave. (Ex. CM; Ritter Aff. ¶ 41, 87; Cozette Aff. ¶ 125-26).

During August 2000, Howard requested that she be reassigned to Blue Ridge Elementary School ("Blue Ridge") for the 2000-2001 school year. (Howard Dep. 521-22). Howard signed a contract for the 2000-2001 school year as "Principal on Special Assignment" at Blue Ridge. (Ex. P). This was a one-year administrator position created specifically for Howard as Blue Ridge already had two administrators for the 2000-2001 school year who had been at Blue Ridge for a number of years.

In a letter dated April 10, 2001, Ritter informed Howard that the Board of Education had decided not to renew her appointment as principal for the 2001-2002 school year. (Ex. DF).

III. Discussion – Defendants' Motion for Summary Judgment [Doc. # 193]

The Defendants request summary judgment on all of Howard's seven claims. The Court addresses each in turn.

A. Free Speech

Howard argues that the District's decision to "demote, remove, fail to transfer, non-renew or rehire and terminate" her employment was motivated by the District's desire to retaliate against her for engaging in protected speech on matters of public concern. The Defendants assert that Howard has failed to show the elements essential to her claim.

Public employees are not stripped of First Amendment protection. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987). However, a government agency, as an employer, has a legitimate interest in regulating the speech of its employees. *Pickering*, 391 U.S. at 568. When these interests conflict, the court must "arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *see Hamer*, 831 F.2d at 1401.

To prevail on her claim, Howard must establish (1) that she engaged in protected speech and (2) that the protected speech was a substantial or motivating factor in the actions taken against her. *Pickering*, 391 U.S. at 569-72; *Mt. Healthy*, 429 U.S. at 287; *Hamer*, 831 F.2d at 1401. If Howard establishes the first two elements, then the Defendants have the opportunity to demonstrate that the same action would have been taken in the absence of the protected activity. *Hamer*, 831 F.2d at 1401; *Calvit v. Minneapolis Pub. Sch.*, 122 F.3d 1112, 1116 (8th Cir. 1997).

The parties have produced a voluminous record and identified a number of times when Howard spoke. Her speech falls roughly into four categories. First, Howard opined that minority, disadvantaged, at-risk, and special education students were being excluded from field trips. Second, she complained that a few teachers were not cooperating with implementing the schools' literacy plan. Third, she identified a lack of resources at Lee. Fourth, she emphasized the importance of improving instruction and achievement levels of all students, particularly minority, disadvantaged, at-risk, and special education students.

For purposes of this Order only, the Court will assume that Howard's speech was protected under the First Amendment; i.e., the first element of her claim is satisfied. *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 148. Nonetheless, the Court concludes that the Defendants are entitled to summary judgment because Howard has failed to present any evidence that her protected speech was a substantial or motivating factor in the District's decision to relieve Howard of her responsibilities as principal at Lee, assign her to the grant writing/analyst position, appoint her as co-principal at Blue Ridge, and not renew her employment contract.

"If the party with the burden of proof at trial is unable to present evidence to establish an essential element of that party's claim, summary judgment on the claim is appropriate because 'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *St. Jude Med., Inc. v. Lifecare Int'l, Inc.*, 250 F.3d 587, 595 (8th Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The Defendants, the ones who moved for summary judgment, must first bear the "initial responsibility of informing

the district court of the basis for its motion, and identifying those portions of [the record as specified in Rule 56(c)] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (quotation omitted). This standard is far from stringent: it is sufficient if the movant points out that the record does not contain a genuine issue of material fact and identifies that part of the record that supports the assertion. *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

On pages 3-4 in their Suggestions in Support [Doc. # 193] of their Motion for Summary Judgment, the Defendants argue that the record does not contain a genuine issue of material fact on the causation issue and point to parts of the record that support the assertion. For example, the record shows that Ritter and Cozette were not aware that Howard raised concerns about the education provided at Lee to minority, at-risk, special education, or disadvantaged students.[2] (Ritter Aff. ¶ 18; Cozette Aff. ¶ 38; Howard Dep. pp. 363-64 (Cozette), 469-71 (Cozette), 557-60 (Cozette and Ritter), 564-66 (Ritter)).[3]

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[2] Howard did raise with Cozette and Ritter concerns about field trips for disadvantaged, minority, at-risk, and special education students, but nothing about the educational achievement of minorities and disadvantaged or disabled students. Howard also discussed with Ritter and Cozette problems she had with certain teachers, but she attributed the problems to implementation of the Literacy Plan generally.

[3] In her deposition (p. 477), Howard states that she raised the issue in her letter of June 18, 2000 (Pl. Ex. 98). However, the letter does not raise concerns about the treatment of or educational opportunities of students.

Also, Howard never mentioned minority, disabled, at-risk, or disadvantaged students during May and June of 2000, during which period the facts that led to her being reassigned were surfacing. During her meetings with Cozette on June 13, June 16, and June 28, 2000, she never mentioned minority, disadvantaged, at-risk, or special needs students at Lee. (Cozette Aff. ¶ 174; Ex. VT; BU; BT; Howard Dep. p. 397-402, 435). Cozette and Ritter never mentioned, and have never suggested, that Howard's support for minority, disadvantaged, at-risk, or special needs students influenced their decisions in any way.

In contrast, Howard has presented no evidence or argument to show that her speech was a motivating factor in any action taken against her. In fact, in her Suggestions in Opposition to the Defendants' Motion for Summary Judgment, she does not address the causation prong of her First Amendment claim. In her deposition Howard did suggest that the Defendants' retaliated against her for her speech because there was no other logical explanation for their action. The following exchange occurred:

> Q: I'm asking what evidence do you have that she [Cozette] retaliated against you because of what you were saying [about the education of minority and disadvantaged students]?
>
> A: I believe that because there's no other logical reason. If it was the teachers[, it] is just pretext. . . .
>
> . . .
>
> Q: What evidence, if any, do you have that Dr. Ritter retaliated against you for talking about providing a high quality equitable education?

> A: I believe that his information may have come from Dr. Cozette. And because this is such an important issue with Columbia Public Schools because they have a history of not doing anything when it comes to serving the minority and the special needs and the disadvantaged.
>
> . . .
>
> Q: Let me ask you though as to Dr. Ritter. How do you know that his information came from Dr. Cozette? Is that just your belief?
>
> A: That is my belief.
>
> Q: Do you have any evidence of that?
>
> A: I have a strong believe that he has information from Dr. Cozette.

(Howard Dep. p. 570-73). Howard's assertion or beliefs is not sufficient to establish a causal connection. *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir. 1994); *White v. Holmes*, 21 F.3d 277, 279-80 (8th Cir. 1994).

Moreover, placing Howard in a position where she would be analyzing test data and literacy data can hardly be described as an effort to silence her about disparities in achievement and reading levels and meeting the needs of disadvantaged students. To the contrary, in that position Howard would have more information than almost anyone in the District about these issues. Similarly, making Howard a principal at Blue Ridge would not silence her on such issues since Blue Ridge is also a Title I school, with a higher percentage of minority and disadvantaged students than Lee. (Ex. AG; Def. SOF 53).

In addition to there being no evidentiary support for Howard's claim that she was reassigned because of her

speech, there is substantial evidence to explain the actions of the District. For instance, the record shows:

•During the1999-2000 school year, several Lee teachers believed that Howard demonstrated poor communication, interpersonal, and leadership skills, and created a negative atmosphere in the school due to the manner in which she interacted with Lee faculty, parents, students, and visitors. (Citations within Def. SOF ¶ 68; *see also* Ex. AQ; Ex. AR; Ex. AV; Ex. AP). The teachers were also concerned with Howard's management of the school. (Citations within Def. SOF ¶ 69).

Lee teachers tried to address these issues internally and tried to talk to Howard about the concerns the staff had about Howard's communication and leadership skills, her management of the school, her displays of anger, student discipline, field trips, and other issues. (Citations within Def. SOF ¶ 75).

For instance, at the May 5, 2000, Lee Faculty Advisory Committee meeting, the Committee gave Howard an agenda that was a list of concerns about Howard's leadership. (Ex. AX; Ex. AW; Ex. BA). The agenda was compiled from comments by Lee teachers and staff. (Ex. AX; Ex. AW; Ex. BA). Karen Ridge, a Lee teacher, also gave Howard a document titled "Personnel Issues" that discussed criticisms and concerns regarding Howard's leadership. (Ex. AO). At the next Faculty Advisory Committee meeting on May 11, 2000, the previous concerns were not discussed and several members of the committee expressed their disappointment with Howard's response to the May 5, 2000, agenda. (Ex. BP).

•On May 12, 2000, Jean Andrews, Home School Communicator at Lee, told Cozette about the situation

with the Faculty Advisory Committee meetings and informed her that there was fighting and tension at Lee that was affecting the teaching environment. (Cozette Dep. p. 535-38, 540-41). Also, in mid-May 2000, Karen James, a Literacy Support teacher at Lee, told Cozette that there were problems between Howard and some of the teachers at Lee. (Cozette Dep. p. 523-27; Ex. BC).

•During the 1999-2000 school year, Dr. Teresa Vandover, Principal at Shepard School and Howard's mentor principal, told Cozette that Howard needed more mentoring than she could provide and mentioned her serious concerns about Howard's ability to lead. (Cozette Dep. p. 344-45; Cozette Aff. ¶ 55; Vandover Aff. ¶ 9, 10)).

•In late May 2000, Dr. Sharon Hoge, the District Language Arts Coordinator, told Cozette that she had serious concerns about the atmosphere at Lee and that she did not believe that Howard was providing effective leadership. (Hoge Dep. pp. 118-19, 143-44, 156-70; Cozette Dep. pp. 371-72; 377-78, 486; Ex. BZ).

•On May 30, 2000, Mona Scott, a first grade teacher, resigned. (Ex. BS). Her resignation letter stated that she was resigning due to tensions between Howard and herself and Howard's poor leadership/communication skills at Lee School. (Ex. BS). Cozette and Ritter received a copy of this letter.

•In mid-June 2000, Ritter and Cozette received a copy of the May 5, 2000, Faculty Advisory Committee agenda. The agenda was attached to a letter from a "concerned citizen." The letter expressed concerns about Howard's leadership and the environment at Lee. (Ex. BH; Ex. BZ).

•During May and June 2000, Ritter and Cozette received letters from three parents of Lee students that raised concerns about Howard's communication and leadership skills. (Ex. BI; Ex. BJ; Ex. BK). One of the letters was from the President of the Lee PTA, Denise Boyd. (Ex. BK).

•On June 10, 2000, seventeen members of the Lee faculty signed a letter to Ritter. The letter stated that they had serious concerns about Howard. (Ex. BL). Ritter gave Cozette a copy of the letter. (Cozette Dep. p. 443-44; Ritter Aff. ¶ 42; Cozette Aff. ¶ 65).

•In the summer of 2000, Dr. Monica Beglau, a consultant hired to assist Howard and the Lee teachers develop a school improvement plan, told Cozette that Howard did not have a good working relationship with Lee teachers. (Ex. BT; Beglau Aff. ¶ 4, 5, 7, 10).

•On June 26, 2000, Cozette met with five representatives of the Lee faculty to discuss the concerns raised by the Lee teachers in their June 10, 2000, letter to Ritter. (Ex. AL; Ex. AX; Ex. BX; Ex. BY; Def. SOF ¶ 141). At the meeting, the representatives told Cozette that they had serious concerns about Howard's leadership, interpersonal skills, communication skills, management style, displays of anger, distrust of staff, and inconsistent handling of discipline issues. (Ex. AL; Def. SOF ¶ 143).

This uncontroverted evidence shows that no reasonable jury could conclude that Howard's speech was a substantial or motivating factor in the District's decision to relieve Howard of her responsibilities as principal at Lee, assign her to the grant writing/analyst position, appoint her as co-principal at Blue Ridge School, and not renew her contract.

For the above reasons, this Court grants Defendants' request for summary judgment on Howard's free speech claim.[4]

B. Procedural Due Process

In Count II, Howard asserts that the Defendants Ritter, Cozette, and the District violated her procedural due process rights under the Fourteenth Amendment to the United States Constitution and Article 1 § 10 of the Missouri Constitution. Howard argues that the Defendants violated her constitutional rights when they terminated her and when they reassigned her to Blue Ridge.

Under the United States and Missouri Constitutions, the requirements of due process apply only when an individual has been deprived of a property or liberty interest encompassed by the due process clauses. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972); *Moore v. Bd. of Educ. of Fulton Pub. Sch. No 58*, 836 S.W.2d 943, 947 (Mo. 1992). When protected interests are implicated, a prior hearing is required, *Roth*, 408 U.S. at 569-70, but the range of interests protected by procedural

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[4] This case is distinguishable from *Ricker v. Benton County School District*, Case No. 01-4198-CV-C-NKL, United States District Court, Western District of Missouri. In that case the school district decided not to renew Linda Ricker's employment contract even though she had received positive evaluations for the past 13 years. She had recently complained about gender issues at the district. After the school board met and made its non-renewal decision, the attorney for the district told Ricker that her problem was "standing up for all those causes." Thus, there was something more in that case than a temporal connection between Ricker's speech and the district's decision not to renew a previously satisfactory employee.

due process is not infinite. *Id.* To have a protected property interest in a benefit, a person must have more than a need or desire or unilateral expectation of it; she must instead have a legitimate claim of entitlement to it. *Id.* at 577-78. The property interest may be created by state law, by contract, or by existing rules and understanding sufficient to support claims of entitlement to a benefit. *Id.*; *see also Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *Singleton v. Cecil*, 176 F.3d 419, 422 (8th Cir. 1999). Thus, when a plaintiff does not possess a protected life, liberty, or property interest, there can be no due process violation. *Singleton*, 176 F.3d at 424.

The Court will address Howard's interest surrounding her non-renewal and her reassignment separately.

1. Howard's Non-Renewal

a. Property Interest

To have a property interest in a benefit, a public employee "must have more than an abstract need or desire for it" and more than a unilateral expectation of it. *Roth*, 408 U.S. at 577. The employee must have a "legitimate claim of entitlement" to the benefit. *Id.*

Here, Howard was employed pursuant to a one year contract. (Ex. C). The terms of Howard's contract created no right to re-employment in the following year. Moreover, no policy or rule of the Columbia Public School District created a right to re-employment or created any legitimate claim to it. Further, Missouri laws do not create a property interest. Principals are ineligible for permanent status in the position of principal under Mo. Rev. Stat. § 168.101. *McCormack*, 935 S.W.2d at 709; *Elrod v. Harrisonville*

Cass R-IX Sch. Dist., 706 S.W.2d 465, 470 (Mo. Ct. App. 1986).

Howard argues that a historical employment practice exists in the District of rehiring principals at their respective schools. A protected property interest in public employment may arise based upon historical employment practices that are based upon "mutually explicit understanding." *Cross v. Hammonds*, 223 F.3d 867, 868 (8th Cir. 2000). A public employee's "unilateral expectations spawned by the regularized practices of his employer will not do." *Hughes v. Whitmer*, 714 F.2d 1407, 1414 (8th Cir. 1983); *see Roth*, 408 U.S. at 578 n.16 (noting that the former employee, a professor at a public University, argued that most teachers hired on a year-to-year basis by the University were rehired, but the practice was nothing approaching a common law of re-employment so strong as to require the University officials to give the employee a statement of reasons and a hearing on their decision not to rehire him).

Here, state law negates a finding that there is a mutually explicit understanding between the District and its principals. In *Williams v. Bd. of Educ., Cass R.-VII Sch. Dist.*, 573 S.W.2d 81, 85 (Mo. Ct. App. 1978), the court held that "[a] public employee may not formulate a de facto expectancy of property right in the face of a contrary positive enactment." The state law is a positive enactment that negates the possibility of finding that a mutual understanding exists that Howard will be re-employed after her one year contract ends. Furthermore, Howard was a principal in the District for only three years, which is not a sufficiently long period of time to create an expectancy when the relevant statutory scheme creates five

years as the changing point in the procedures the District owes the principal.

b. Procedural Protections Afforded by State Statutes

The Defendants argue that Howard was not deprived of procedural due process protections contained in state statutes. In Missouri, employment and re-employment of a principal is controlled by Mo. Rev. Stat. § 168.101. *McCormack*, 935 S.W.2d at 709; *Inman v. Reorganized Sch. Dist. No. II of Hayti*, 845 S.W.2d 688, 690-94 (Mo. Ct. App. 1993). According to Mo. Rev. Stat. § 168.101(6), if a public school principal has been re-employed as a principal five times within a school district, the principal is entitled to certain due process protections. However, if the principal has been re-employed less than five times in a school district, then the principal is not entitled to the due process protections. *Williams*, 573 S.W.2d at 85; *McCormack*, 935, S.W.2d at 709. Since Howard was employed by the Columbia Public School District for only three years, she was not entitled to the due process protections afforded by Mo. Rev. Stat. § 168.101(6).

c. Procedural Protections Provided by the Board Policy

Howard alleges that Board Policy provides for due process procedures over and above those provided in Mo. Rev. Stat. § 168.101(6). The Columbia Public School District's Board of Education Rules and Regulations (the "Policy") (Ex. CH) state that "notice of nonrenewal for such employees [certified employees ineligible for tenure in their present positions] shall be provided in the same

manner as required for probationary teachers. (Ex. CH, policy GCPD p. 3). Notice is provided to probationary teachers as follows: "[On or before] April 15 in each school year, the Board of Education shall notify a probationary teacher who will not be retained by the school district of the non-renewal of his or her contract." (Ex. CH, policy GCPD p. 3). In a letter dated April 10, 2001, the Defendants notified Howard of her non-renewal (Ex. DF). Thus, the requirements of the Policy were satisfied.

Since Howard had no property interest in re-employment based upon her contract nor the practices of the District, and she was given the procedural due process required by state statutes and District policy, Howard's procedural due process claim under the United States and Missouri Constitutions fails.

2. Howard's Reassignment

In her complaint, Howard alleges that she was deprived of her property right to continued employment at Lee for 2000-2001 when the District reassigned her. Howard's employment contract states that the "Employee agrees to accept employment as PRINCIPAL in the public schools of the District. . . . " (Ex. C) (emphasis in original). The contract is not specifically for Lee. Furthermore, Howard's employment contract provides that she was subject to and agreed to comply with all applicable policies, rules, and regulations of the District. (Ex. C). The District's policies provide that "[e]ach employee of the Board of Education shall be assigned or reassigned to a specific position or positions at the direction of the Superintendent." (Ex. CH, policy GCA). As such, Howard had no

constitutionally protected property interest in staying as principal of Lee.

For the foregoing reasons, the Defendants did not violate Howard's procedural due process protections under the United States or Missouri Constitutions by reassigning Howard or by not renewing her one year employment contract. This Court grants the Defendants' request for summary judgment as to Count II.

C. Liberty Interests

Howard next alleges another due process violation claiming that the Defendants harmed her liberty interest "to be free from the stigma imposed upon her by the employment removal and subsequent termination action taken by Defendants because of their officially undisclosed and false claims, all of which resulted in Plaintiff's inability to continue in pursuing her chosen vocation and profession." (Complaint ¶ 149).

A public employee is entitled to procedural due process in connection with being discharged from employment only when she has been deprived of a constitutionally protected property or liberty interest. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972); *Shands v. City of Kennett*, 993 F.2d 1337, 1347 (8th Cir. 1993). Howard alleges that she was deprived of her liberty interest by the stigma the Defendants imposed upon her. In this context, to establish a protected liberty interest, Howard must present evidence that a school official, in connection with discharging or reassigning Howard, publicly made untrue statements about Howard that would stigmatize her so as to seriously damage her standings and associations in the community, or foreclose her

freedom to take advantage of other employment opportunities. *Roth*, 408 U.S. at 573-74; *Paul v. Davis*, 424 U.S. 693, 709-10 (1976); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("To establish a liberty interest in his good name, [the plaintiff] must show that the reasons for discharge stigmatized him and that the defendants made the reasons public."); *Mascho v. Gee*, 24 F.3d 1037 (8th Cir. 1994) ("[T]he employee must show defamation by a state official, and that the defamation occurred in the course of the termination of employment"). An employee's liberty interests are implicated when the employer "levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges." *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994); *Kyles v. Eastern Neb. Human Servs. Agency*, 632 F.2d 57, 61 (8th Cir. 1980). The requisite stigma has generally been found in cases in which the employer has accused the employee of dishonesty, immorality, criminality, racism, or the like. *Green v. St. Louis Housing Authority*, 911 F.2d 65, 69 (8th Cir.1990) (quoting *Harrison v. Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987)); *Robinson v. City of Montgomery City*, 809 F.2d 1355, 1356 (8th Cir.1987).

Howard contends that multiple pieces of communication at the time of her transfer labeled her a racist, implied that she had a mental disorder, and stigmatized her. (Pl. Suggestions in Opposition [Doc. # 218] p. 15). The Court will address each communication Howard raises in turn.

First, the Court notes that most of the instances Howard highlights deal with Howard's internal transfer. The Supreme Court has ruled that without a change of legal status, a stigmatized public employee's cause of

action is simply one for defamation under state law. *See Meachum v. Fano*, 427 U.S. 215, 226, 228-29 (1976). Thus, the Court made it clear that the constitution does not require the government to give its stigmatized employee a hearing if the pubic employee remains a public employee. *See Paul v. Davis*, 424 U.S. at 710. Further, the Eighth Circuit has held that the "internal transfer of an employee, unless it constitutes such a change of status as to be regarded essentially as a loss of employment, does not provide the additional loss of a tangible interest necessary to give rise to a liberty interest meriting protection under the due process clause of the fourteenth amendment." *Hughes v. Whitmer*, 714 F.2d 1407, 1417 (8th Cir. 1983) (citing *Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977)). Therefore, Howard's stigma claim fails because her internal transfer to the district-wide grant writing position or the principal on special assignment at Blue Ridge had the same salary, benefits, and number of days worked as her job at Lee. Notwithstanding the above and in the interest of completeness, the Court addresses each communication Howard raises.

Howard argues that Ritter caused a disparaging article about her removal to be published in the local newspaper. The July 18, 2000, article has the headline, "Lee principal takes districtwide post." (Ex. 108).[5] The first line is "a principal with a golden touch for grant writing will take her talents districtwide." (Ex. 108). The article

[5] There is another newspaper article in the record that was published on July 12, 2000, in the local newspaper. The article touts the success of Howard's grant writing skills, mentioning that under Howard's leadership Lee had won twenty grants for $150,000. The article does not address Howard's reassignment and, thus, is not relevant to the current analysis.

stated that Howard was "assuming" a new position. (Ex. 108). No reasonable jury could conclude that the article was negative or implied she was a racist, had a mental disorder, or rose to the level of stigma which impacted upon her liberty interest.

Howard also asserts that a July 12, 2000, letter from Ritter to members of the Board of Education significantly defamed her and impinged upon her liberty interest. The letter sets forth the chronology of the events leading up to Ritter's decision to reassign Howard. (Ex. 111). The letter states that Howard lacks people skills and needs to improve her instructional leadership and interpersonal skills. (Ex. 111). This letter was an internal memorandum directed and provided only to the Board to whom Ritter reports. The memorandum was not publicly disseminated. Thus, it is not relevant to Howard's claim. *Roth*, 408 U.S. at 573-74 (holding that to establish a protected liberty interest, the plaintiff must show that a school official *publicly* defamed her); *Merritt v. Reed*, 120 F.3d 124, 126 (8th Cir. 1997) (holding that plaintiff must show that named defendants caused the deprivation of the right).

Howard also contends that a memorandum from Ritter to the Lee faculty and staff on July 14, 2000, so stigmatized her that she could [sic] find alternative employment. The memorandum informs the faculty and staff that Howard was "transferred to a new position within the school district." (Ex. 290). The memorandum noted that her new job would be in the areas of research, data analysis, and grant writing, all areas for which she has "shown particular skills in all of these areas and will be an asset to the entire district in this new role." (Ex. 290).

The memorandum also stated that a reception would be held for the new principal. Howard alleges that at this reception, Ritter stated that he had "taken into consideration their request . . . and thought that Mary Sue Gibson [the person replacing Howard as Lee principal] would be a collaborative principal in which to work with." (Steinhubel Depo. p. 450). Howard maintains that this disparaged her by implying that Howard did not work collaboratively with the teachers. At best, this is an inference based on an innuendo which is insufficient to infringe on a protected liberty interest. *Mascho v. Gee*, 24 F.3d 1037, 1039 (8th Cir. 1994) (noting that the Court had rejected a claim that stigma might be created by "innuendo from inferences drawn from general allegations of misconduct. . . .").

Howard also points to activities of fellow employees, such as creating an agenda for a faculty meeting on May 5, 2000, (Ex. AX, AW, BA), creating and signing the June 20, 2000, letter (Ex. BL), contacting Cozette with their problems and concerns with Howard, and contacting parents to request that they send letters to Ritter. However, none of these activities were done by Howard's employer. These activities are not relevant to show that her *employer* publicized information which constitutionally stigmatized her.

Finally, Howard maintains that Ritter and David Ballenger, the District Board President, defamed her by terminating her, knowing that it would make it hard for her to find employment. Declining to re-employ someone, without more, does not deprive Howard of a protected liberty interest. *Roth*, 408 U.S. 564. In *Roth*, a University president informed a non-tenured teacher that he would not be rehired for the next academic year but did not give any reason for the decision. The Supreme Court recognized that the term "liberty" included "the right . . . to

engage in any of the common occupations of life" and held that the University's decision did not implicate any liberty interest. The Court explained that in deciding not to re-employ the teacher, the University imposed on him no stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. It stretched the concept of liberty too far to suggest that a person is deprived of liberty when he is discharged from one job but remains as free as before to seek another. Furthermore, Howard was non-renewed twice before being hired by the Columbia School District. There is insufficient evidence that the non-renewal decision by Defendants so stigmatized Howard that she was deprived of a liberty interest.

In conclusion, the Court holds that the statements identified by Howard, considered separately and in combination, do not create the level of stigma required to implicate a constitutionally protected liberty interest. The publicized communications attributable to the Defendants are not so damaging as to make it difficult or impossible for Howard to escape the stigma, if any, of those statements. Furthermore, almost all of the communications identified by Howard relate to her internal transfer, which, as discussed above, is not relevant to the Court's inquiry. The Court grants the Defendants' request for summary judgment on Howard's third claim.

D. Substantive Due Process

In Count IV of Howard's Complaint, Howard alleges that the Defendants violated her substantive due process rights. As noted above, the due process clause of the Fourteenth Amendment prohibits state governments from

depriving "any person of life, liberty or property, without due process of law. . . . " U.S. Const. amend. XIV, § 1. The clause has two components, procedural due process and substantive due process.

Substantive due process is violated if the state government exercises its power arbitrarily without any reasonable justification considering the state's legitimate governmental objective. *See, e.g., Daniels v. Williams*, 474 U.S., at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). Substantive due process limits what the government may do in both its legislative and its executive capacities. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (legislative); *Rochin v. California*, 342 U.S. 165 (1952) (executive). Howard's allegations are directed at actions by the District in its executive capacity.

To rise to the level of a substantive due process violation, an executive abuse of power must "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172-73 (1952). The United States Supreme Court has repeatedly emphasized that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). The conduct must be sufficiently outrageous or truly irrational, something more than arbitrary, capricious, or in violation of state law. *Young v. City of St. Charles*, 244 F.3d 623, 628 (8th Cir. 2001); *see also Rochin*, 342 U.S. at 173 (noting that the conduct must violate the "decencies of civilized conduct"); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive'

that it did not comport with traditional ideas of fair play and decency" would violate substantive due process).

Howard states the facts she relies upon for her substantive due process claim in two sentences.[6] Howard alleges that Cozette and Ritter used her as a scapegoat in order to implement the District's literacy plans by getting teachers on board and quelling dissent. Howard also states that the Defendants rely on "fabricated evidence against Dr. Howard in the form of a fake EEOC charge against her." Howard fails to provide the Court with a cite to the record to support either allegation.

The Court holds that no reasonable jury could conclude that either of these factual situations constitute conscience-shocking behavior. All principals, including Howard, were expected to carry out District initiatives, including the initiative to implement the literacy plan. That the District expected her to implement the literacy plan of the District does not shock the conscience. As to the charge that the District relied on fabricated evidence against Howard, the Court finds no support for his claim in the record. The only EEOC charge the Court finds in the record is a charge of discrimination filed against

[6] To be complete, the Court also looked to Howard's complaint for insight into the facts upon which Howard relies for her substantive due process claim. In the complaint, Howard appears to allege that her rights were violated by the Defendants' silencing her speech regarding the District's widespread custom and practice of ignoring the District's low income, disadvantaged, and minority students. The Supreme Court has held that when a particular Amendment provides an explicit textual source of constitutional protection against government behavior, that Amendment, not the more generalized notion of substantive due process is the guide for analyzing the claim. *Lewis*, 523 U.S. at 842. Here, Howard's argument is subsumed by the first amendment as discussed in her first claim discussed in section III.A.

Howard in August 2000. (Ex. BG). The Court has not found, and Howard has not directed the Court to, any evidence that the charge is fabricated. The fact that the Defendants referenced an EEOC charge against Howard is not close to the conscience-shocking threshold.

Neither factual scenarios Howard presents to the Court approaches the level of outrageous, egregious, or conscience-shocking behavior needed to support a substantive due process claim. Therefore, the Court grants the Defendants' request for summary judgment on Howard's substantive due process claim.

E. Equal Protection

In Count V, Howard asserts that the Defendants violated her equal protection rights. The equal protection clause protects fundamental rights, protects against suspect classifications, and also protects its citizens from "arbitrary and irrational state action." *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996). To prevail on an equal protection claim, a plaintiff must first demonstrate that she was treated differently from other similarly situated employees. *Id.*; *Arnold v. City of Columbia Missouri*, 197 F.3d 1217, 1220 (8th Cir. 1999); *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996). Second, a plaintiff must prove that the defendant had an unlawful intent to discriminate against her for an invalid reason, based on motives which "fail to comport with the requirements of equal protection." *Batra*, 79 F.3d at 721 (stating that the plaintiff must show that the defendant intentionally or purposefully discriminated); *Lockhart v. Cedar Rapids Cmty. Sch. Dist.*, 963 F.Supp. 805, 816-17

(N.D. Iowa 1997) (discussing and applying the unlawful intent element articulated in *Batra*).

Here, Howard argues that the Defendants had a policy and custom of remediation for principals before firing them. Howard points to Betsy Baker, principal of Parkade Elementary School, Ed Schumacher, principal of Field Elementary School, and Bill Williamson, principal of Field School, as principals who had problems and changed their professional growth plans instead of being transferred or terminated. While the Defendants contend that none of the principals were similarly situated with respect to the nature, scope, and severity of the concerns expressed or the number and manner of individuals expressing concern, viewing the facts in the light most favorable to Howard, a reasonable jury could infer that Howard was treated differently from similarly situated individuals. However, Howard makes no showing that the Defendants intentionally discriminated against her based on any category protected by the equal protection clause. Therefore, the Court grants the Defendants' summary judgment on Howard's Count V based on violations of the equal protection clause.

Qualified Immunity

The individual Defendants, Ritter and Cozette, argue that they are entitled to summary judgment on the basis of qualified immunity. Qualified immunity "shields government officials from suit unless their conduct violated a clearly established statutory or constitutional right of which a reasonable person would have known." *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Supreme Court

has directed courts to conduct a two-part inquiry in ruling on the issue of qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Court must first consider whether, taken in the light most favorable to the party asserting the injury, the facts alleged show that the public official's action violated a constitutional right. *Id.* at 201. Assuming that constitutional rights were violated, the second step of the inquiry is to determine whether the right was clearly established by determining whether it would have been clear to a reasonable official at the time of the violation that his action indeed violated that right. *Id.* at 201-02. It is not necessary to show that "the very action in question has previously been held unlawful," but "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citations omitted). The qualified immunity defense ordinarily fails where the law claimed to have been violated was clearly established, because "a reasonably competent public official should know the law governing his conduct." *Phillips v. Collings*, 256 F.3d 843, 850 (8th Cir. 2001) (quoting *Harlow*, 457 U.S. at 818-19).

Here, the Court has already concluded that no reasonable jury could conclude that the Defendants violated Howard's constitutional rights; therefore, Ritter and Cozette are entitled to qualified immunity. Even if Cozette and Ritter's conduct did violate the constitution, no reasonable official could have been on notice, given these facts, that his or her conduct violated Howard's constitutional rights. Therefore, the individual Defendants, Ritter and Cozette, are dismissed from Howard's 42 U.S.C. § 1983 claims.

G. Tortious Interference with Contract and Employment Expectancy

In Count VI, Howard assets a tortious interference with contract and employment expectancy claim against individual Defendants Ritter and Cozette. The Defendants argue that, first, they are entitled to official immunity and, second, Howard has failed to establish elements essential to her claim.

The doctrine of official immunity protects public employees acting within the scope of their authority from liability for injuries related to the performance of discretionary acts or omissions. *Kanagawa v. State*, 685 S.W.2d 831, 835 (Mo. 1985); *Davis v. Bd. of Educ. of City of St. Louis*, 963 S.W.2d 679, 688 (Mo. Ct. App. 1998). Official immunity does not apply to discretionary acts done in bad faith or with malice. *Davis*, 963, S.W.2d at 688. Howard does not contest that Ritter and Cozette's employment decisions were discretionary acts. Howard argues only that they acted with bad faith and malice with no cite to the record. In contrast to Howard's assertion, the record is devoid of any evidence warranting an inference of actual or legal, bad faith or malice on the part of Ritter or Cozette. The Court holds that Ritter and Cozette have official immunity with respect to Howard's Count VII allegations.[7]

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[7] Even if the Court did not find official immunity, Howard has failed to establish that Ritter and Cozette's actions were motivated solely by malice or ill-will. To prevail on a claim of tortious interference, Howard must establish (1) the existence of a contract; (2) defendants' knowledge of the contract; (3) that defendants induced or caused the breach of contract; (4) that defendants' acts were not justified; and (5) that the plaintiff thereby suffered damages. *Franklin v. Harris*, 762 S.W.2d 847, 848 (Mo. Ct. App. 1989). The fourth element, the defendants' acts were

(Continued on following page)

H. Breach of Contract

In Count VII of her complaint, Howard alleges a breach of contract claim against the District. Howard contends that the District breached the implied covenant of good faith and fair dealing. The District contends that it did not breach the contract, including the implied covenant of good faith, since Howard received the full "benefit of the bargain" she claims she lost.

The elements of a breach of contract claim are: "(1) the existence of a valid contract; (2) the rights and obligations of the respective parties; (3) a breach; and (4) damages." *White v. Pruiett*, 39 S.W.3d 857, 861-62 (Mo. Ct. App. 2001); *Howe v. ALD Services, Inc.*, 941 S.W.2d 645, 650 (Mo. Ct. App. 1997). Further, Missouri law implies a covenant of good faith and fair dealing in every contract. *Farmers' Elec. Co-op., Inc. v. Missouri Dep't of Corrections*, 977 S.W.2d 266, 271 (Mo. 1998); *Slone v. Purina Mills, Inc.*, 927 S.W.2d 358, 368 (Mo. Ct. App. 1996).

The issue here is whether there was a breach of the implied covenant of good faith and fair dealing. To prevail on a breach of duty claim, the party must present substantial evidence that the other party "acted in bad faith or engaged in unfair dealing." *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 410 (Mo. Ct. App. 1996).

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not justified, requires Howard to establish by substantial evidence that Ritter and Cozette's actions were motivated solely by malice or ill-will and not by any purpose to perform their duty as supervisors. *Id.* Here, Howard has not met the evidentiary burden required for the fourth element.

Howard's contract[8] states that the "[e]mployee agrees to accept employment as PRINCIPAL in the public schools of the District . . . " (emphasis in original) and that the "[e]mployee is subject to and agrees to comply at all times with all of the provisions, duties and requirements applicable to his or her position as directed by the Superintendent or the Employee's immediate supervisor, and as stated in any applicable written performance standards or criteria, policies, rules and regulations of the District, whether adopted or modified before or after the effective date of this contract." (Ex. C). Board Policy GCA states that "each employee of the Board of Education shall be assigned or reassigned to a specific position or positions at the direction of the superintendent." (Ex. CH). Ritter had the authority to reassign Howard. (Pl. SOF ¶ 607-09). Thus, as a matter of law, it was not a breach of contract for the District to reassign Howard to the district-wide grant writing position or the Blue Ridge principal on special assignment.

Howard argues, nonetheless, that the District breached the covenant of good faith and fair dealing implied in the employment contract by removing Howard from Lee and relocating her to the grant writing position. A party to a contract violates its duty of good faith and fair dealing if it exercises its discretion to "evade the spirit of the transaction" or deny the "expected benefit of the contract." *Farmers' Elec. Co-op., Inc. v. Missouri Dep't of*

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[8] Howard signed contracts for the 1998-1999 and 1999-2000 school year. (Ex. C). Howard was not notified before April 15, 2000, regarding her employment for the next year. Thus, Mo. Rev. Stat. § 168.101.3 provided that she was reemployed on the same terms as the current contract, Howard's 1999-2000 contract.

Corrections, 977 S.W.2d 266 (Mo. 1998); *Envtl. Prot. Inspection & Consulting, Inc. v. City of Kansas City*, 37 S.W.3d 360 (Mo. Ct. App. 2000). Howard argues that the District denied her the benefit of the bargain by assigning her to the district-wide grant writing position, since the benefit of her bargain was to be the principal of Lee. In contrast, the District argues that Howard received the same salary, the same benefits, and occupied the same level of position in the district-wide grant writing position. Furthermore, as soon as Howard objected to the grant writing position, the District and Howard negotiated a position as principal for the 2000-2001 school year at Blue Ridge. Howard and the District both performed the contract. Howard has not shown that the benefit of her bargain was evaded. The benefit of her bargain was to be compensated for being a principal.[9] That is, in fact, the benefit she received. Howard performed the job of principal on special assignment at Blue Ridge, and the District compensated her.[10] No reasonable juror could conclude that the District breached its duty of good faith and fair

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[9] Howard argues, without citation to the record, that the benefit of her bargain was to be an elementary school principal. (Pl. Suggestions Opp. [Doc. # 218] p.21.) However, Howard's contract is for a "PRINCIPAL in the public schools of the District. . . . " (emphasis in original). There is no mention in the contract or the record that the contract was intended solely for an elementary school.

[10] Furthermore, the District showed its good faith by addressing the concerns regarding Howard as soon as the facts came to its attention. The District worked to find a job it thought Howard had accepted: in fact, she accepted a paycheck and reported to work in the grant writing position. As soon as the District knew that she did not accept the grant writing position, it worked with her to find, and create, another acceptable job. Howard accepted the job as principal at Blue Ridge, Howard performed the job at Blue Ridge, the District performed its obligations; thus, any possible breach was effectively cured.

dealing. The Court grants the District's request for summary judgment.

I. Judicial Review

Howard next petitions the Court for judicial review for two decisions: July 11, 2000 (decision to transfer Howard to district-wide grant writing position), and April 9, 2001 (decision to non-renew Howard's contract). The Court will address each decision separately.

1. April 9, 2001 Decision (Non-Renew Contract)

The Missouri Administrative Procedure Act distinguishes between contested and uncontested cases. If a case is contested, it is reviewable pursuant to Mo. Rev. Stat. §§ 536.100 to 536.140. If a case is uncontested, it is reviewable pursuant to Mo. Rev. Stat.§ 536.150. A contested case "means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Mo. Rev. Stat. § 536.010(2). The defining characteristic of a contested case is a formal, adversarial hearing as "required by law." *Id.* The law requiring such a hearing is extraneous to the Missouri Administrative Procedure Act. *Mosely v. Members of Civil Serv. Bd. for the City of Berkeley*, 23 S.W.3d 855, 859-60 (Mo. Ct. App. 2000). The law may be found in an ordinance, a statute, or a state or federal constitutional provision. *Id.* Here, the applicable law is Mo. Rev. Stat. § 168.101(6). Section 168.101(6) states that a public school principal who is non-renewed is entitled to certain procedural protections only if she has been re-employed as a principal five times within a school district. Howard was

not re-employed within the District five times; thus, the law does not require a hearing and, for purposes of the Missouri Administrative Procedure Act, this is not a contested case.

Since this is an uncontested case, review of the case is available under Mo. Rev. Stat. § 536.150. However, there is an exception to this rule of available review concerning at-will employees. Section 536.150 does not authorize judicial review of the termination of at-will employment. *Mosely*, 23 S.W.3d at 859. This is because "at-will employees may be lawfully fired for any reason or for no reason at all." *Id.* Howard was essentially an employee at will since she had no property interest in continued employment (see *supra* section III.B.1.a.), no statute or rule guaranteeing her procedural protections, her contract was for a limited period (Ex. C), and Howard has not presented sufficient evidence to show she had a legitimate expectation of continued employment based upon historical practices of the District (see *supra* section III.B.1.a). Thus, this Court is unable to review the Board's decision under Mo. Rev. Stat. § 536.150.

2. July 11, 2000, Decision (Reassignment)

Howard argues that she had a statutory right to continued employment as principal at Lee based upon her employment contract with the District. Missouri Rev. Stat. § 168.101.3 provides: "Each school board having one or more certified employees . . . under contract shall notify each such certified employee in writing concerning [her] reemployment in [her] present staff position or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the

part of a board to give the notice constitutes reemployment on the same terms and in the same staff position as those provided in the contract of the current fiscal year. . . ." Howard argues that since she was not given written notice that she would be removed from her position as principal at Lee before April 15, 2000, the District violated her statutory right to be employed on the same terms and in the same staff position by reassigning her to the grant writing position.

Howard's reassignment is not a contested case because the law, Mo. Rev. Stat. § 168.101.3, does not require the rights or duties of parties to be determined after a hearing.[11] Section 168.101.3 only provides that Howard had a contract for employment under the same terms and position as her last contract: it does not provide that a hearing must be held to determine a party's legal rights, duties, or privileges. As discussed in sections III.B.1.a., III.B.1.c., and III.B.2., this contract was not breached.

The reassignment may,[12] however, be an uncontested case with judicial review available pursuant to Mo. Rev. Stat. § 536.150. The Court will, therefore, address that statute as well. At the time she was reassigned, Howard had a contract for employment for a specific period of time and, thus, she was not an employee at-will (in contrast to

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[11] The District also argues that the July 11, 2000, decision to reassign Howard was not an agency decision since Ritter had the authority to transfer Howard from Lee School without approval from any member of the board. (Ritter Aff. ¶ 144).

[12] The Court assumes that Ritter, as Superintendent, was an administrative officer within the meaning of Mo. Rev. Stat. § 536.150. If Ritter is not an administrative officer, Howard would not be entitled to judicial review under § 536.150.

the April 10, 2001, decision when she was an employee at-will as discussed in section III.I.1.). The Court reviews the decision by determining if the decision was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." Mo. Rev. Stat. § 536.150. The Court "shall not substitute its discretion for discretion legally vested in the administrative officer." *Id.* As discussed above in sections III.A., III.B., III.C., III.D., III.E., III.G., and III.H., the Court finds that the decision to reassign Howard to a grant writing position was within the discretion of Ritter and was constitutional, legal, reasonable, and was not arbitrary, capricious, or an abuse of discretion.[13]

K. Punitive Damages

In Counts I-VI, Howard seeks punitive damages against Defendants Ritter and Cozette.

Because the Court has found that no reasonable jury could find that defendants Ritter and Cozette violated any law with respect to their employment decisions regarding Howard, the Court grants the Defendants' request for summary judgment concerning punitive damages under Counts I-VI.

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[13] It is unclear to the Court whether Howard had any administrative remedies she failed to exhaust before bringing this claim; however, Howard is not required to exhaust her administrative remedies for review pursuant to § 536.150. *Strozewski v. City of Springfield*, 875 S.W.2d 905, 907 (1994) (holding that exhaustion of administrative remedies is not a jurisdictional prerequisite to judicial review in uncontested cases).

IV. Discussion – Plaintiff's Motion for Partial Summary Judgment [Doc. # 194]

In Plaintiff's Motion for Partial Summary Judgment, Howard requests summary judgment on six defenses the Defendants raise in their First Amended Answer. However, the defenses and Howard's request for summary judgment are moot as the Court granted the Defendants' request for summary judgment as to all of Howard's claim.

V. Miscellaneous Pending Motions

The Court grants, for summary judgment purposes only, Plaintiff's Motion to Strike Deposition Errata Sheet of Mary Laffey [Doc. # 258]; Plaintiff's Motion to Strike Affidavit of Sharon Hoge [Doc. # 265]; Plaintiff's Motion to Strike the Supplemental Affidavit of Dr. Ritter [Doc. # 266]; and Plaintiff's Motion to Strike Affidavit of Defendant Cozette [Doc. # 267].

The Court denies, for summary judgment purposes only, Defendants' Motion to Strike [Doc. # 195]; Defendants' Motion to Strike Plaintiff's Use of Materials From the Barlow Case in this Case [Doc. # 239]; Defendants' Motion to Strike Portions of Plaintiff's Affidavit and Exhibits in Opposition to Defendants Summary Judgment Motion and Memorandum in Support [Doc. # 240]; Defendants' Motion to Strike Plaintiff's Use of Testimony and Materials from Hope Quaintance [Doc. # 241]; Plaintiff's Motion to Strike Affidavit of Christopher Flinchpaugh and Attached Document [Doc. # 254]; Plaintiff's Motion to Strike Affidavit of Marty Patton and Attached Document [Doc. # 255]; Plaintiff's Motion to Strike Affidavit of Shari Kraus and Attached Document [Doc. # 256]; and Plain-

tiff's Motion to Strike Affidavit of Denis Boyd and Attached Documents [Doc. # 257].

The Court grants Howard's request to use the Barlow depositions for summary judgment purposes only. The Court denies the remainder of Howard's motion [Doc. # 204]. The Court also denies Howard's Motion for Contempt [Doc. # 205].

VI. Conclusion

Accordingly, it is hereby

ORDERED that Defendants' Motion for Summary Judgment [Doc. # 193] is GRANTED. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment [Doc. # 194] is DENIED as moot. It is further

ORDERED that, for summary judgment purposes only, the following motions are GRANTED: Plaintiff's Motion to Strike Deposition Errata Sheet of Mary Laffey [Doc. # 258]; Plaintiff's Motion to Strike Affidavit of Sharon Hoge [Doc. # 265]; Plaintiff's Motion to Strike the Supplemental Affidavit of Dr. Ritter [Doc. # 266]; and Plaintiff's Motion to Strike Affidavit of Defendant Cozette [Doc. # 267]. It is further

ORDERED that, for summary judgment purposes only, the following motions are DENIED: Defendants' Motion to Strike [Doc. # 195]; Defendants' Motion to Strike Plaintiff's Use of Materials From the Barlow Case in this Case [Doc. # 239]; Defendants' Motion to Strike Portions of Plaintiff's Affidavit and Exhibits in Opposition to Defendants Summary Judgment Motion and Memorandum in

Support [Doc. # 240]; Defendants' Motion to Strike Plaintiff's Use of Testimony and Materials from Hope Quaintance [Doc. # 241]; Plaintiff's Motion to Strike Affidavit of Christopher Flinchpaugh and Attached Document [Doc. # 254]; Plaintiff's Motion to Strike Affidavit of Marty Patton and Attached Document [Doc. # 255]; Plaintiff's Motion to Strike Affidavit of Shari Kraus and Attached Document [Doc. # 256]; and Plaintiff's Motion to Strike Affidavit of Denis Boyd and Attached Documents [Doc. # 257]. It is further

ORDERED that Plaintiff's Motion for Order for Leave of Court to Permit the Use of Depositions in the Barlow Case in this Case [Doc. # 204] is GRANTED in part and DENIED in part in accordance with this order. It is further

ORDERED that Plaintiff's Motion for Contempt [Doc. # 205] is DENIED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District
Judge

Dated: February 27, 2003
Jefferson City, Missouri

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-1882	*	
Karol K. Howard,	*	
Appellant,	*	
v.	*	
Columbia Public School District; James R. Ritter, individually and in his official capacity as the Superintendent of the Columbia Public Schools; Cheryl Cozette, individually and in her official capacity as Assistant Superintendent of the Columbia Public Schools,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

May 18, 2004

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
SEP 28 2004
OFFICE OF THE CLERK

(2)

No. 04-209

IN THE

Supreme Court of the United States

KAROL K. HOWARD, PETITIONER

v.

COLUMBIA PUBLIC SCHOOL DISTRICT, JAMES R. RITTER, AND CHERYL COZETTE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS' IN OPPOSITION

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QUESTIONS PRESENTED

I. May the petitioner present in her Petition for Writ of Certiorari issues and argument not preserved in the District Court or Court of Appeals?

II. Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the District Court's grant of summary judgment where the petitioner failed to present any evidence establishing that her "protected speech" was a factor in the employment decisions at issue?

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JURISDICTIONAL STATEMENT

Respondents agree with petitioner that jurisdiction in this Court could be founded on 28 U.S.C. § 1254 if the appropriate facts and circumstances were present. This case, however, presents none of the compelling circumstances that could warrant a writ of certiorari as required by this Court's Rule 10. Therefore, this Court should exercise its discretion to deny the relief requested by petitioner.

STATEMENT OF THE CASE

Petitioner Karol Howard has presented to this Court, as she did in the courts below, a version of the facts based largely on misrepresentations of the record, exaggerations, speculation, and unwarranted inferential leaps. Contrary to Howard's assertions, the lower courts did not erroneously characterize the record or ignore relevant evidence. Rather, as indicated by the District Court's Order and the Eighth Circuit's opinion, neither court found Howard's characterization of many salient facts to be accurate or supported by inferences that can be reasonably drawn from the record.

Very briefly, Howard was hired by the Columbia Public School District ("CPS") in 1998, and was assigned to serve as principal at Robert E. Lee Elementary School ("Lee"). During her two years at Lee, Howard reported to defendant Dr. Cheryl Cozette, the Assistant Superintendent for Elementary Education. Cozette, in turn, reported to defendant Dr. James Ritter, CPS's Superintendent.

During the 1999-2000 school year, as part of the CPS's increasing emphasis on the importance of literacy and school improvement, Ritter, Cozette and the Board of Education implemented a district-wide Literacy Plan and School Improvement Program, and took other measures to help struggling students throughout the District. These were initiatives by the District that Howard, as part of her job as principal, was supposed to help implement effectively. Cozette and Ritter routinely discussed with principals the resources available to improve the achievement of minority, disadvantaged and special needs students, and principals regularly spoke to Cozette and Ritter about staffing needs and achievement of minority, disadvantaged and special needs children.

While these initiatives were in the process of being implemented, Howard told Cozette that she was having trouble working with two first grade teachers on literacy and school improvement. Based on Howard's representations, Cozette and Ritter thought these were isolated issues and that most of the Lee faculty supported Howard. By late May 2000, however, it became clear that the problems at Lee were much broader than Howard had represented, that there were tensions and low morale at Lee, and that serious questions were being raised from a variety of sources about Howard's communication and leadership skills and abilities. After investigating the multiple concerns that were being expressed, Cozette and Ritter concluded it would not be in the best interests of the students, teachers, others in the Lee community or Howard herself for Howard to continue in her assignment at Lee for the 2000-2001 school year.

While at Lee, Howard had drafted several successful grant applications and had indicated an interest in analyzing student test data. Given the District's emphasis on school improvement and literacy programs, CPS needed assistance in interpreting assessment data and helping schools utilize it. Cozette and Ritter believed Howard could be successful in these areas on a district-wide level.

Accordingly, Ritter and Cozette met with Howard on July 11, 2000, and explained that they did not think she could be successful at Lee, given the scope of the concerns that existed about her leadership, communications skills and management style. Howard did not deny that there were serious problems between her and the Lee faculty, nor did she claim they were the result of her speech. Ritter then discussed with Howard the new district-wide assignment CPS was offering. He explained that he believed she could be successful in this assignment, which involved analyzing test and literacy data being generated as part of the District's literacy initiatives, and assisting building principals with grant writing. During the meeting, Howard indicated that she would transfer to the district-wide position and did not object to the reassignment. She asked only if she could take some vacation time and where she was to report.

Howard reported to her new district-wide assignment for three days and then returned to Lee and "sat in" the office for several days. She told the District's Deputy Superintendent that she was not happy with her new position and that her attorney told her to sit at Lee. The District placed her on paid administrative leave until the parties could agree on an

alternate assignment. Following negotiations between Howard and her attorney and CPS and its attorney, Howard was placed in a position specially created for her for the 2000-2001 school year as a Principal on Special Assignment at the school of her choice, Blue Ridge Elementary, where she received the same salary and benefits she would have received at Lee. That was the only year, before or since, that Blue Ridge has had three full-time administrators. Among other things, Howard also negotiated for and received paid time off to look for employment outside the District.

In April 2001, in accordance with applicable Missouri law, Howard was timely notified that the position specially created for her at Blue Ridge for the 2000-2001 school year would be eliminated the following year, and that her one-year contract with the District was being non-renewed. That notice in no way prevented her from applying for other positions with the District, and she did apply for several positions for which she was considered but not selected by the respective selection committees, because they did not find her to be the best qualified candidate. The teachers at Lee had no role in the decisions not to select her for other positions and not to renew her contract with the District.

Respondents will not attempt to address all the misrepresentations of the facts and the record in petitioner's statement of the case. By way of illustration, however, the following are some examples.

Howard did not receive "excellent performance evaluations" as she states in her petition; rather, she was rated as "meets expectations" on most of the

evaluation criteria. In contrast, she evaluated the teachers she now attacks and accuses of bias as "exemplary professionals" and gave them excellent performance evaluations. She never mentioned any discrimination in any teacher's performance evaluation; she never counseled, disciplined or spoke to teachers about alleged discrimination. She never counseled or disciplined any teacher for excluding students from class. She counseled only one teacher about excluding special needs students from field trips and said nothing about excluding minority or disadvantaged students from class or field trips.

Lee is one of CPS's smaller elementary schools, and has since 1991 been an "expressive arts" school. Howard's background and teaching experience was as a band teacher, and that is one of the reasons she was selected for the position at Lee. Like other elementary schools in the District, Lee serves a particular attendance area. However, because of Lee's focus on the arts, it has often had a waiting list of students from outside the attendance area who wish to attend as "special permission" students. There is no evidence in the record that special permission students are or were necessarily Caucasian, as Howard indicates. Moreover, contrary to Howard's assertion, the demographics at Lee did **not** change dramatically in the 1999-2000 school year. Although Lee does not (and did not) have one of the highest percentages of minority/disadvantaged students in the district, the student population at Lee has, for many years, been diverse, with a significant percentage of African-American students, international

students[1], economically disadvantaged students and some special needs students. That did not change in any material way while Howard was there. The teachers Howard now denigrates and accuses of discrimination have chosen to teach at Lee for many years, and were familiar with that student population.

Howard was not "demoted" when she was reassigned to the district-wide position. She was never told she was being demoted; Ritter and Cozette never told anyone she was demoted and the reassignment to a district-wide position was not viewed as a demotion. To the contrary, that position was at or above the level of a building principal, had the same salary and benefits, the same number of work days and still involved reporting to an Assistant Superintendent.

The Lee teachers Howard now seeks to discredit were by no means the only ones who expressed concerns about Howard's leadership and communications skills. Among other things, seventeen Lee faculty members (including 11 of the full-time classroom teachers) sent Ritter a letter dated June 10, 2000, expressing serious concerns about Howard's leadership and asking him to intervene to address the difficult working environment at Lee. One teacher sent a letter dated May 30, 2000, advising the District that she was resigning due to plaintiff's poor leadership and communication skills. Theresa Vandover, an

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[1] The University of Missouri's main campus is located in Columbia, and the children of a number of graduate students from other countries live in the Lee attendance area. Indeed, this group of students from well-educated families comprise part of the group Howard describes as "economically disadvantaged."

experienced principal at another elementary school who was assigned as Howard's mentor, told Cozette she had serious concerns about Howard's leadership, that her communication skills were a concern, and that Howard needed more help than she as a mentor could provide. Dr. Monica Beglau, a school improvement consultant who was brought in by Howard to assist in developing a school improvement plan for Lee, shared with Cozette her observations that Howard was unable to communicate effectively with the teachers, and did not have the leadership, communication or problem-solving skills necessary for her position at Lee. Dr. Sharon Hoge, Language Arts Coordinator for the District, told Cozette in May 2000 that she had concerns about the atmosphere at Lee and about Howard's leadership. Ritter and Cozette also received letters from the Lee PTA President and two other Lee parents expressing their concern about Howard's communication and leadership skills and the morale at Lee, and Cozette talked with the PTA President about her letter and the isues.[2] (See App. pp. 26-28.)

Howard did not tell Cozette there were problems with minority children. Rather, Howard claimed during her deposition that when she spoke to Cozette about "Lee students," she was including minority, special needs and disadvantaged students

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[2] Howard's statement that the teachers initiated and/or were responsible for the parent letters is flatly contradicted by the record and the sworn statements of the parents to the contrary. During her investigation of the matter, Cozette also talked to some Lee staff members who supported Howard, none of whom were full-time classroom teachers at Lee.

even though she did not specifically mention those groups. (See App. at 8.)

The teachers at Blue Ridge did not advise Ritter and Cozette in their letter of support or otherwise that they wanted Howard to be principal at Blue Ridge as Howard claims. Rather, after another candidate had been selected for the position of principal and after Howard had received her notice of non-renewal, a number of Blue Ridge staff signed a letter expressing their appreciation of Howard's work. Both the retiring principal and the assistant principal at Blue Ridge told the District's Human Resources Director during the selection process that they did not think Howard would be good for the principal position at Blue Ridge.

Howard did not talk about discrimination against minority students or suggest that her speech was a factor in the concerns expressed about by others about her leadership and communication skills and the atmosphere at Lee during any of her meetings with Cozette while Cozette was investigating the situation in June 2000, nor did Howard make any reference to these issues in her June 18, 2000 letter to Ritter.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed to Preserve the Causation Argument She Now Attempts to Present in her Petition for Writ of Certiorari, and Her Causation Argument is not Supported by the Record; Therefore, the Eighth Circuit did not Address the Argument in its Decision and its Opinion is not in Conflict With Decisions of Other Circuits.

This case simply does not present the issues that Howard claims warrant certiorari. Howard did not properly raise or preserve the first question as to which she seeks review. Not only did Howard completely fail to present this (or any) argument as a basis for establishing the causation element of her First Amendment claim before the District Court, she did not properly raise or present this issue before the Eighth Circuit Court of Appeals.

Even if Howard had presented this question and it were properly before this Court, the Eighth Circuit's decision is not in direct conflict with decisions of other circuits as Howard erroneously contends. It was not necessary for the Court of Appeals even to address the issue because the record does not support the factual premises on which Howard bases the question she now seeks to present. This is not a case in which there is any direct evidence of discriminatory animus based on Howard's speech, nor is there circumstantial evidence from which any such inference can reasonably be drawn. Rather, Howard's claim rests on speculation, surmise and unjustified inferences presented here as established facts. Both the District Court and the

Eighth Circuit correctly held that Howard wholly failed as a matter of law to present evidence establishing that her speech was a substantial or motivating factor in the employment decisions about which she complains.

A. The First Question Presented by Howard is Not Properly Before this Court for Review.

Howard submits to this Court that teachers at Lee School were biased against her because of her exercise of free speech, and that these allegedly biased subordinates, while having no decision-making authority, exercised substantial influence over the actual decision makers. Based on these factual assertions, Howard asks whether the alleged bias of the teachers can be imputed to the formal decision makers for purposes of imposing liability. Howard has, however, procedurally waived her right to present this issue to the Court.

Howard did not raise this legal issue before the District Court in her Suggestions in Opposition to Defendants' Motion for Summary Judgment or otherwise. In fact, Howard failed even to address the causation prong of her First Amendment claim in her response in opposition to defendants' motion. (See App. at 24.) Rather, she argued only that she had engaged in protected speech (an issue which the courts below assumed for purposes of the motion, but did not decide). Nevertheless, the District Court carefully reviewed the voluminous record and held that, as a matter of law, "no reasonable jury could conclude that Howard's speech was a substantial or motivating factor in the [Columbia Public School] District's decision[s]. . .." (App. at 28.)

The District Court granted summary judgment in favor of respondents on all counts and claims.

In her main brief on appeal to the Eighth Circuit, Howard did not present in her statement of issues or otherwise address the legal question she now asks this Court to consider. She cited none of the cases on which she now purports to rely. Rather, Howard merely asserted that she had presented "substantial evidence to prove causation," which she accused the District Court of "disregarding." The gravamen of Howard's argument was that she had provided information about her speech to defendants Ritter and Cozette, that **they** were the ones with the alleged improper motivation, and that they made their employment decisions in retaliation for her protected speech.

In their brief in response in the Court of Appeals, respondents demonstrated why Howard had not accurately characterized the record, why the record did not, in fact, support Howard's conclusory assertion that Ritter and Cozette's actions were motivated by an intent to retaliate against her for her alleged speech, and why the District Court had correctly held that, as a matter of law, she had failed to establish causation. Indeed, the "protected speech" in which Howard claimed to have engaged concerned precisely the same issues Ritter, Cozette and CPS were emphasizing, and the plans and initiatives they were in the process of implementing throughout the District in an effort to improve literacy and achievement for all students.

In her reply brief, Howard still did not squarely raise the first issue she now seeks to present to this

Court. She did, however, very briefly argue a point that is marginally related to the legal issue in her question presented. Howard flatly asserted, without support or explanation, "There is evidence some teachers did not like Howard's speech." Then, heaping inference on assumption, she baldly labeled any interpersonal friction that existed at Lee as "inextricably linked" with her "protected speech," stating that it could not, therefore, justify any adverse employment action. She made no attempt to support any of these conclusory pronouncements by relating them to any evidence supported by the record, nor could she have done so. Howard merely presented as a "given" her speculation that any complaints made about her by Lee teachers must have been motivated by her speech, rather than by the many concerns expressed about her leadership abilities and communication style, not only by Lee teachers, but also by various administrators, parents and others. Howard did, however, cite several Eighth Circuit cases, which she also cites in her petition to this Court, although not in connection with her argument on this question. Rather she now cites these cases in support of her argument for the second question she purports to present for review.[3] Howard never squarely presented to the

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[3] Ironically, the cases she cited in her reply brief indicate that, in determining whether a plaintiff has made a submissible case on the issue of causation in a First Amendment case, the Eighth Circuit will consider whether reports from subordinates of antagonism and interpersonal friction can be directly or "inextricably" linked to a plaintiff having engaged in protected conduct, where (unlike the present case) such assertions are supported by evidence on the record. *See, e.g., Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991); *Roberts v. Van Buren Public Schools*,773 F.2d 949(8th Cir. 1985).

appellate court the issue she now asserts, nor did she cite any of the cases from other circuits on which she now seeks to base her claim of a conflict among the circuits.

After a panel of the Eighth Circuit unanimously affirmed the District Court's grant of summary judgment, Howard filed a Petition for Rehearing with Suggestions for Rehearing En Banc, in which she raised six challenges (some with multiple subparts) to the Eighth Circuit's decision. Howard did not raise this question or suggest that the Eighth Circuit's decision created a conflict among the circuits in her petition for rehearing. Her petition was denied.

The Eighth Circuit has repeatedly held that claims not raised in an initial brief are generally deemed waived. *See, e.g., XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1026 n.3 (8th Cir. 2004) (finding that it would not be appropriate to address an argument that appellant did not raise in the District Court, did not raise in its main appeal brief but raised for the first time in its reply brief); *Cavegn v. Twin City Pipe Trades Pension Plan*, 333 F.3d 879, 882 n. 2 (8th Cir. 2003) (declining to address an argument raised for the first time in a reply brief); *Mahaney v. Warren County*, 206 F.3d 770, 771 n.2 (8th Cir. 2000) ("Claims not raised in the initial brief are waived.")(per curiam); *State Auto. Mut. Ins. Co. v. Mitchell*, 179 F.3d 590, 592 (8th Cir. 1999) ("We generally do not address issues and arguments asserted for the first time in a reply brief.").

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970), this Court stated that "where issues are

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." Moreover, this Court has repeatedly held that "it is only in exceptional cases coming here from the federal court that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). *See also Youakim v. Miller*, 425 U.S. 231, 235 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958) (declining to address an issue "not raised in the Court of Appeals").

Thus, even if the argument presented in Howard's reply brief could be broadly construed as raising the first legal question Howard seeks to present to this Court, it was not properly raised in the court below, or addressed by the Eighth Circuit in its opinion. It is therefore not properly before this Court.

B. The Eight Circuit's Decision is Not in Direct Conflict with The Decisions of Other Circuit Courts

Howard cites Third, Fourth, Sixth, Ninth and Tenth Circuit cases for the proposition that a plaintiff can demonstrate causation by producing evidence that the actual decision maker was influenced by subordinate employees who took offense at the content of plaintiff's speech. She states that the Eighth Circuit's decision is in direct conflict with these decisions. It is not.

Even if the question presented were properly before this Court, Howard's claim that the Eighth

Circuit's decision "creates a conflict between the Eighth Circuit and most other circuits that have considered this issue" (*id.* at 16) is patently incorrect. The Eighth Circuit did not address this theory of causation one way or the other in its opinion, and its silence on the issue in the circumstances of this case certainly does not create a conflict between the Eighth Circuit and other circuits. It merely reflects that, as set forth above, the question was not properly raised or presented as an issue on appeal, and further, that the factual premises on which Howard attempts to base this belatedly-raised argument are simply not supported by the evidence.

In cases where a plaintiff properly presents the issue and the record supports plaintiff's claim (see p. __ and fn 3 *supra*), the Eighth Circuit has considered whether complaints from subordinates are sufficiently linked to the plaintiff's protected activity to create an issue for the jury on whether such activity was a substantial or motivating factor in the challenged decision. *See, e.g., Stever v. Independent School Dist. no. 625*, 943 F.2d 845, 853 (8th Cir. 1991)(if deterioration in interpersonal relationships with other staff members was caused by plaintiff's protected speech, that deterioration cannot justify an adverse employment action if it is inextricably linked to the protected speech); *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 958 (8th Cir. 1985)(decline in plaintiff's evaluations could not be used to justify her dismissal if lower scores could be traced to supervisor's disapproval of plaintiff's union activities); *Patterson v. Masem*, 774 F.2d 251, 256 (8th Cir. 1985) (plaintiff's perceived lack of interpersonal skills due to abrasiveness and antagonism she engendered among peers could not be legitimate factor

justifying refusal to promote if peer's antagonism resulted from their disagreement with plaintiff's civil rights activism).

In the present case, Howard's argument on the causation issue rests on purported factual assertions that are based largely on misrepresentations, exaggeration, speculation and, as the Eighth Circuit put it, "unwarranted inferential leaps." (App. at 7.) Thus, as both the District Court and the Court of Appeals properly concluded after review of the record, even giving Howard the benefit of all reasonable, justifiable inferences, the evidence was insufficient to create an issue of fact for the jury as to whether her speech motivated respondents' actions. (App. at 6-8, 24.)

Despite Howard's attempt to couch this issue as a "conflict in the law," there is no such conflict presented by petitioner's case. What she is really asking this Court to do is to reconsider, in a different context, the sufficiency of the evidence on the causation element of her First Amendment claim, evidence the lower courts found insufficient as a matter of law after review of the record.

In an attempt to create the illusion of a conflict, Howard also improperly relies on cases from other circuits where, unlike this case, the evidence was held sufficient to raise a genuine issue of material fact. Her reliance on these cases is unavailing to present circumstances warranting a writ of certiorari. This is particularly well-illustrated by Howard's reliance on *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), a case she describes as "on all fours" with her own case.

Howard correctly notes that, in *Love-Lane*, the Fourth Circuit reversed a grant of summary judgment against Love-Lane, an African-American assistant principal who was demoted to teacher, concluding that she had raised a genuine issue of material fact as to whether she was demoted in retaliation for engaging in protected speech. Howard has, however, misleadingly described the facts in *Love-Lane* in an effort to match her distorted characterization of the facts in her own case.

According to Howard, "[Love-Lane's] removal was based upon complaints from teachers who took offense at the content of Love-Lane's speech opposing discriminatory practices against African-American and poorer students in her elementary school." (Petition, p. 20.) Howard focuses solely on the alleged actions of the teachers, stating that they banded together against Love-Lane and complained to the principal and the superintendent about their difficulties in working with her, and that, as a result of the complaints, Love-Lane was removed from her position and demoted. Howard notes that the reason given by the superintendent was Love-Lane's poor working relationships with the principal and staff. (*Id.*) Howard omits, however, all the facts present in *Love-Lane* that distinguish it from her own case.

Unlike Howard, who was new to CPS when she was assigned to Lee, Love-Lane had worked for the school district in question for fourteen years as a teacher and for seven years as an assistant principal. She consistently received evaluations of excellent or superior in almost all aspects of her performance, with some of her strongest skills in the areas of

communication and problem solving. In 1995, she was reassigned to Lewisville Elementary School, where she was told by the superintendent, Donald Martin, that "an African-American presence" was needed. An atmosphere of racial tension had existed at Lewisville since principal Brenda Blanchfield, who is white, had taken over. Blanchfield was perceived as ineffective and insensitive in addressing the problems and concerns of African-American teachers, students and parents. *Love-Lane*, 355 F.3d at 769, 771. Lewisville is located in a suburb where it mainly serves middle to upper class white children, but approximately thirty-five percent of the students were poor or working class African-Americans bused in from other areas. Martin acknowledged that there were problems with racial perceptions about Blanchfield and, when Love-Lane expressed concerns about working with Blanchfield, Martin agreed to monitor the situation. *Id.* at 769-70.

As assistant principal at Lewisville, Love-Lane observed discriminatory practices that placed many African-American students at a disadvantage, particularly with regard to disciplinary measures. There was clear evidence that she spoke out repeatedly about these discriminatory practices, and that some of the teachers resented the questions Love-Lane was openly raising about their disciplinary practices. There was clear evidence that she raised these issues with Blanchfield, and that Blanchfield refused to intervene. There was also undisputed evidence that she raised her concerns about Blanchfield and the racially discriminatory practices at Lewisville directly with Superintendent Martin on a number of occasions. Despite his agreement to "monitor" the situation, Martin discounted her concerns about race

discrimination, insisting that she had a personality conflict with Blanchfield that had nothing to do with race. He warned her that she would have no future as an administrator unless she was willing and able to respect the authority of the principal. He also told Love-Lane that it was not her job to worry about the children, it was her job to please her principal. *Id.* at 772-73.

Despite Martin's warnings, Love-Lane continued to voice concerns about race discrimination. Her relationship with Blanchfield continued to deteriorate and teachers complained that she was overbearing, intimidating and unsupportive of their disciplinary practices. Blanchfield gave Love-Lane a lowered evaluation and sent her a memo, also copied to Martin, stating that Love-Lane's continued vocal opposition to certain disciplinary practices showed "blatant disrespect" for Blanchfield. Martin's own assessment of Love-Lane grew more negative as she continued to speak out about discrimination; when she repeated her continuing concerns, Martin told her he did not want to hear about Lewisville. When she nevertheless persisted, he demoted her to a non-administrative teaching position. *Id.* at 781-82. In light of this clear evidence in the record, which was by no means limited to the complaints of teachers, the Fourth Circuit held that the facts, when viewed in Love-Lane's favor, were sufficient to create a genuine issue of material fact as to whether the superintendent demoted Love-Lane because she spoke out against race discrimination in discipline. *Id.* at 774-75.

In contrast with the facts in *Love-Lane*, the evidence in the present case was insufficient to show a

causal relationship between any "protected speech" by Howard and the challenged employment actions. At Lee School, where Howard was initially assigned as principal, a higher percent of the student body was African-American and/or economically disadvantaged than at Lewisville, and the record contains no evidence of an atmosphere of racial tension or discrimination at Lee before Howard arrived. In contrast with *Love-Lane*, the record does not support Howard's claim that she spoke out in the manner or to the extent she claims. Furthermore, many of the statements Howard claims to have made simply reiterate priorities being emphasized by Ritter, Cozette and other principals as part of CPS's literacy plan, improvement program and achievement initiatives. Also unlike Love-Lane, Howard was **not** demoted, despite her own insistence that she was. And unlike the evidence in *Love-Lane*, the evidence in the present case fails to support Howard's conclusory pronouncement that the complaints and concerns expressed by the teachers were "motivated by Howard's speech," rather than by her overall leadership and communication skills and the autocratic manner in which she attempted to manage.

Petitioner erroneously contends that the lower courts failed "to consider the substantial influence the teacher complaints appeared to have on the Respondents as critical evidence that Respondents were motivated by Howard's speech." (Petition at 16.) That is not the case. Rather, the evidence simply failed to establish that Howard's alleged "protected speech" did, in fact, influence, let alone "substantially influence," either the teachers' complaints or the employment decisions made by respondents. There is no evidence beyond petitioner's own self-serving conjecture and

conclusory assertions that respondents' actions were motivated by an intent to retaliate against her. Indeed, when asked during her deposition what evidence she had that Ritter or Cozette were motivated against her because of her speech, she testified only that was her "belief," because in her view there was no other logical explanation for their actions. (See App. pp. 24-25.) Petitioner's unsupported personal belief, no matter how firmly held, is not evidence of causation.

The remainder of the cases from the other circuits on which Howard relies can be similarly distinguished. The present case does not demonstrate a conflict between the circuits on a question of law. Howard's petition reflects nothing more than a party who is unhappy with the lower courts' determination that her evidence was insufficient to establish a genuine issue of material fact for the jury and who is desperate to find an issue worth further review.

C. This Case is Distinguishable From and Unrelated to *Hill v. Lockheed Martin Logistics Management, Inc.*

In her petition, Howard states that "[t]his issue is similar to and related to the Petition for Writ of Certiorari in *Hill v. Lockheed Martin Logistics Management, Inc.*, Case No. 03-1443, which is pending before this Court," and that the "conflict of law" in this case is the same conflict as in *Hill*. That is inaccurate. As set forth above, the Eighth Circuit's opinion in this case does not in any way establish a conflict with other circuits on the issue she seeks to present. Moreover, this case is readily distinguishable from *Hill* in a number of crucial respects.

First, *Hill* is a mixed-motive employment discrimination case, in which the issue was age and gender discrimination. There was direct evidence that an individual named Fultz, who took affirmative actions that were instrumental in Hill's dismissal, was hostile towards Hill because of her age and gender. The legal issue squarely presented to the Fourth Circuit was whether liability could be imposed on the employer under a mixed-motive analysis where it could be shown that a subordinate (Fultz), who allegedly harbored discriminatory animus, substantially influenced the adverse employment action taken against Hill. *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.2d 277(4th Cir. 2004)(en banc). The en banc Fourth Circuit concluded that it was not enough to show "substantial influence;" rather, it was necessary to show that the subordinate was the one "principally responsible" for, or the "actual decision maker" behind, the adverse employment action. The Court of Appeals based its conclusion that this is the appropriate standard on the language of the discrimination statutes and decisions of this Court, in particular *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 151-52 (2000). *Id.* at 288-89.

Unlike *Hill*, the legal issue Howard now seeks to assert was neither squarely presented to the Eighth Circuit for its consideration, nor was it decided by the courts below. Unlike *Hill*, there was no direct evidence of animus because of Howard's "protected speech," nor could such an inference reasonably be drawn from the circumstantial evidence. Unlike *Hill*, the present case is not an employment discrimination case arising out of the discrimination statutes. It involves a First Amendment claim, and, in that context, this Court has

long held that a plaintiff's protected speech must be shown to be a "substantial or motivating factor" in the challenged decision. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Thus, it is significant and telling that *Love-Lane*, the case Howard contends is on "all fours" with her case and which involved a First Amendment issue, was decided by the Fourth Circuit after it decided *Hill*, yet the Fourth Circuit does not cite *Hill* in *Love-Lane*.[4]

Other circuit courts addressing agency principles in the employment discrimination context have reached somewhat varying conclusions with respect to who can be considered a relevant decision maker and the degree of influence they must exert over the challenged employment decision in order to impute liability to the employer, *e.g.*, whether that influence must be "enormous" or "substantial" or whether it is sufficient if the person who is shown to have discriminatory animus is "closely linked with" or "tainted" the challenged employment decision, or whether they must be the actual decision maker. *See Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657, 666-668 and fn 4 (4th Cir. 2003) and cases cited therein. But even if the analysis in *Hill* has any relevance to First Amendment claims, *Hill's* recognition of the possibly

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[4] Similarly, the Eighth Circuit cases cited by the en banc Fourth Circuit in *Hill* and by Hill in her petition to this Court are employment discrimination cases, not First Amendment cases. *Hill*, 354 F.3d at 290 (citing *Kramer v. Logan County School District No. R-1*, 157 F.3d 620 (8th Cir. 1998), a Title VII gender discrimination case), Hill Petition for Writ of Certiorari, p. 16-17 (citing *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993), a Title VII sex discrimination case, and *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991), a Title VII race discrimination case).

varied standards of causation remains unavailing to Howard. The evidence presented by Howard simply fails to satisfy **any** of the standards discussed in *Hill*. As the courts below held, Howard did not present any evidence of causation and no reasonable inference could be drawn from the record that Howard's speech was a motivating factor in the challenged employment decisions.

In short, this case is not, as petitioner suggests, "directly related to" or "similar to" *Hill* and, regardless of the disposition in *Hill*, Howard's belated attempt to embrace the issue raised by Hill in her petition does not warrant review by this Court in Howard's case. Howard should not be permitted to reformulate the issues and reargue the record because she thinks she has found another case, involving different issues and facts, in which this Court may have expressed some interest.

II. The Eighth Circuit Correctly Held that Petitioner's Evidence Failed to Give Rise to a Reasonable Inference that any "Protected Speech" by Petitioner Motivated the Employment Decisions About Which She Complains, and that Her Claims were Insufficient as a Matter of Law to Create a Genuine Issue of Material Fact

In the second question Howard purports to present for review, she again attempts to characterize the Eighth Circuit's decision on her First Amendment claim as being in direct conflict with decisions of other circuits and with other decisions of the Eighth Circuit on the issue of causation. The present case does not,

however, demonstrate a conflict between the circuits on a question of law or a conflict with prior Eighth Circuit opinions. Once again, Howard is really only challenging whether the evidence is sufficient to create a triable question on the issue of whether her speech was a substantial or motivating factor in the employment actions in question. Once again, this case involves nothing more than a party who is disappointed that the lower courts granted summary judgment in favor of respondents, and who now seeks to recast her case as one involving a certiorari-worthy conflict among circuits. This case presents no issue warranting certiorari under this Court's Rule 10.

That this is merely a "sufficiency of the evidence" issue is illustrated by Howard's insistence that the lower court "disregarded her evidence as to the extent her speech played" in the actions taken against her because

> [t]he lower court's decision did not address the issue of motivation raised by Dr. Howard, that is, that Respondent's (sic) reasons for the adverse employment actions were inextricably linked to Dr. Howard's speech.

(Petition at 25.) In short, she relies on the issue obliquely raised for the first time in her reply brief, and repeats her belated, bald and completely unsupported contention that her speech was "inextricably linked" to the challenged employment actions, without pointing to any evidence establishing that alleged link. The courts below did not "disregard" her evidence; they did not decline or refuse to consider "the extent a plaintiff's speech played in the adverse employment decision."

(Petition at 26.) Rather, beyond Howard's own bare pronouncement that an inextricable link existed, the evidence simply was not there.

Contrary to Howard's assertion, the Eighth Circuit did not "grossly misapply" the standards this Court has set out for reviewing evidence for summary judgment purposes. It properly reviewed the record, considered the evidence presented, and found none to support the causation element of Howard's First Amendment claim. It correctly held, as a matter of law, that there is no genuine issue for trial, *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); thus, summary judgment was appropriate because Howard failed to establish the existence of a genuine issue of material fact with respect to an essential element of her claim. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). [5]

Petitioner's reliance on cases from other circuits and prior decisions from the Eighth Circuit where, unlike this case, the evidence **did** establish genuine issues of material fact with respect to the employer's motive, are completely unavailing to show error or any

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[5] Contrary to Howard's contention, this Court did not hold in *Hunt v. Cromartie*, 526 U.S. 541 (1999), that it is necessarily "error for the lower court to resolve the issue of motivation and intent at the summary judgment stage." (Petition at 29.) This Court stated only that "it was error in [that] case" because of the disputed record before the Court. This Court added that "[w]e can imagine an instance when the uncontroverted evidence and the reasonable inferences to be drawn in the nonmoving party's favor would not be 'significantly probative' so as to create a genuine issue of fact for trial." *Id.* at 553 (quoting *Anderson*, 477 U.S. at 249-50). This is just such a case.

"direct conflict" warranting review by this Court. Indeed, Howard's citation to and reliance on the Eighth Circuit's decisions in *Stever*, *Roberts* and *Patterson*, where, in contrast with this case, the plaintiffs presented sufficient evidence to create a genuine issue of fact on causation, underscores that this case is about the sufficiency of the evidence, not the Eighth Circuit's alleged "failure to follow its own precedent," or any conflict or misapplication of the law.

Howard's claim that this Court did not address in *Mt. Healthy City School District Board of Education v. Doyle* the questions she purports to present in this petition does not change the fact that there is nothing certiorari-worthy about this case. Even assuming, *arguendo*, that these "evidentiary questions" (Petition at 28) actually require further clarification, it would be unavailing to Howard. Regardless of whether summary judgment can be granted when the employee's speech is inextricably linked to an adverse employment action, (*id.*) there is no evidence of any such link in Howard's case. Similarly, regardless of whether liability can attach to an employer when a "prejudiced subordinate's influence plays a substantial role in the actual decision maker's decision to take adverse employment action" (*id.*), there was no evidence of such prejudice or substantial influence in this case. Rather, this is just another attempt by Howard to suggest that a question of law exists, when the issue is really that the evidence she presented was insufficient under any suggested standard to create a material fact question on an essential element of her First Amendment claim.

CONCLUSION

For all the reasons set forth above, Howard's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 04-209

Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

KAROL K. HOWARD,

Petitioner,

v.

COLUMBIA PUBLIC SCHOOL DISTRICT, JAMES R. RITTER, AND CHERYL COZETTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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REPLY ARGUMENT

I. Petitioner's Causation Arguments made in her Petition for Writ of Certiorari have been preserved and are properly before this Court.

Petitioner's causation arguments were squarely presented to the lower court in Petitioner's written briefs, during oral argument before the lower court and in Petitioner's Petition for Rehearing.[1] In Petitioner's brief to the Eighth Circuit (p. 20), Petitioner argued she had "presented sufficient evidence to create a triable issue of fact on her 42 U.S.C. §1983 claim in that the alleged "interpersonal friction" is inextricably linked with Howard's speech which is a disputed fact precluding summary judgment." Petitioner's counsel also argued this issue to the lower court in oral argument. Further, in her Petition for Rehearing (pp. 5-7), Petitioner once again addressed the question of motivation by first stating the issue, "Whether interpersonal friction arising from a public employee's speech (cause-and-effect) can justify an adverse action because it is inextricably linked with her protected speech and does it create genuine issues of material fact precluding summary judgment on a public employee's First Amendment claim under 42 U.S.C. §1983?", and then presenting argument on the issue. The same case law cited in Petitioner's Petition for Writ of Certiorari is the same case law Petitioner cited to the lower court. *Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991); *Roberts v. Van Buren Public Schools*, 773 F.2d 94 (8th Cir. 1985); and *Patterson v. Masem*, 774 F.2d 251 (8th Cir. 1985). The lower court did not address the issues raised by Petitioner.

It is important to note that the two questions presented to the Court in Petitioner's Petition for Writ of Certiorari are interrelated with one another. Both questions involve

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[1] Contrary to Respondents' inaccurate assertion, Petitioner addressed causation at the District Court level in her Suggestions in Opposition to CPS' Motion for Summary Judgment, Response to CPS' Statement of Facts, and in her Reply Brief.

the extent the employer's motive predominates when the adverse employment decision is inextricably linked to the employee's exercise of free speech. In this case, it is Petitioner's exercise of free speech which is inextricably linked to the subordinate teachers' complaints, said complaints which substantially influenced Ritter and Cozette to take adverse employment action against Petitioner.

Further, Petitioner consistently stated and presented evidence to the lower court that the decision to remove her from the Lee principal position was because teachers who did not like and were offended by Petitioner's speech, caused complaints to be made about Petitioner to Drs. Ritter and Cozette. Petitioner has consistently stated and presented evidence that it was the biased teachers' complaints, their influence, which was the critical source relied on by Ritter and Cozette for the adverse action taken against Petitioner. In Petitioner's briefs to the lower court, Petitioner presented evidence Ritter made statements to the Board that Petitioner was removed from her Lee principal position because teachers (the subordinate employees) were upset about Petitioner's speech. Petitioner also presented to the lower court a memo from Dr. Ritter to the Board, which stated the reason for the removal was the teachers' complaints. In Petitioner's Petition for Rehearing (p. 7), Petitioner argued, "Ritter, in the context of explaining to the Board the reason why he made the decision to remove Howard from Lee, told the Board that teachers were upset with what Howard was saying in faculty meetings." Dr. Ritter and Dr. Cozette admitted the influence of the teachers in their depositions by testifying Petitioner was removed due to teachers' complaints. There has been no waiver of Petitioner's right to present her issues to the Court.

Even assuming *arguendo*, the arguments were not made before the lower courts, there are exceptions in which this Court has exercised its discretionary powers to hear questions not raised below. *See Vance v. Terrazas*, 444 U.S. 252, 258-259, n. 5 (1980). This Court has held that addressing an issue which had not been raised in a petition is particularly appropriate where the question is in a "state of evolving definition and uncertainty," and is "one of importance to the

administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1089, n. 8 (1991). In *St. Louis v. Praprotnick*, 485 U.S. 112 (1988), the Court addressed an issue which had not been raised previously, for the reason it was a question which appeared "likely to recur in §1983 litigation against municipalities." *Id.* at 120. The two questions presented in this case by Petitioner, both of which involve municipal liability, are in an acute state of evolving definition and uncertainty, and manifestly need clarification from the Court. Both questions are critically important to the administration of federal law and are likely to recur in §1983 actions against municipalities.

II. This Court's Review is warranted because the Conflict between the Eighth Circuit and Other Circuit Courts is real and the Conflicts are Intolerable.

Contrary to Respondents' assertions, the conflict between the lower court's decision in this case and decisions in the other Circuit Courts is real. Petitioner cited in her Petition (pp. 19-26) numerous cases from other circuits unequivocably demonstrating an intolerable conflict exists. Respondents, however, do not actually address the conflict, but take a simplistic view in its attempt to distinguish those cases. Respondents' superficial position essentially is, that the cases from the other circuits do not demonstrate a conflict because the courts in those cases held the evidence was sufficient to create a genuine issue of fact, whereas in Petitioner's case, the evidence was not sufficient. Respondents, however, ignore the main crux of Petitioner's argument, which is, that the *types of evidence* utilized by Plaintiffs in those cases which the other circuit courts held to be sufficient to raise a genuine issue of material fact, are the same or similar to the *types of evidence* Petitioner relied on which the Eighth Circuit rejected. Such a drastic difference in the treatment of the same or similar evidence by the Eighth Circuit in this case, as compared to the other circuit courts, is what creates this intolerable conflict.

Similarly, Respondents' argument that this case is merely a "sufficiency of the evidence" case also misapprehends the issues Petitioner has raised. The conflicts of law which exist in this case among the circuits, are conflicts involving evidentiary and proof requirements which may be used to prove causation in §1983 First Amendment cases. These questions raise exceptionally important questions of federal law which are of great importance to the public citizenry. This Court's review is warranted to maintain uniformity in decisions among the circuits.

Respondents next attempt to distinguish *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004) by setting out what Respondents believe to be factual differences. Respondents' argument, however, actually highlights the factual similarities, demonstrating Petitioner's case is on "all fours" with *Love-Lane*. The similarities in the evidence are striking: Love-Lane and Petitioner were both long-time educators: Petitioner, a 22-year educator with 7 years experience as a principal; and Love-Lane, a 21-year educator, with 7 years experience as an assistant principal. Both Love-Lane and Petitioner received excellent evaluations. At Love-Lane's school there was an atmosphere of discrimination against minority students. At Petitioner's school there was an atmosphere of discrimination against minority, special needs and economically disadvantaged students. Petitioner and Love-Lane both spoke out repeatedly about the discriminatory practices in their respective schools. Teachers resented Love-Lane's speech and banded together against her. Teachers resented Petitioner's speech and banded together against her. Both Petitioner and Love-Lane continued on with their protected speech. Love-Lane was removed from her position and was demoted. Petitioner was removed from her position and demoted. The decisionmakers in Love-Lane's case relied on biased subordinates (the teachers). The decisionmakers in Petitioner's case relied on biased subordinates (the teachers). *The only difference,* and the one which creates the conflict, is that the Fourth Circuit held Love-Lane's evidence was sufficient to raise a genuine issue of fact as to whether Love-Lane was demoted in retaliation for engaging in protected speech, while in Petitioner's case, the Eighth Circuit held the

same type of evidence was not sufficient to raise a genuine issue of fact as to whether Petitioner was demoted and terminated in retaliation for engaging in protected speech. Such a conflict is intolerable.

Respondents' attempt to distinguish Petitioner's case from *Hill v. Lockheed-Martin Logistics Management, Inc.*, Case No. 354 F.3d 277 (4th Cir. 2004) (en banc) is also unpersuasive. First, the fact that *Hill* is a Title VII discrimination case does not distinguish it from this mixed-motive case because the legal standards required to prove causation to establish a claim under §1983 is identical to that required under Title VII. *Brennan v. Norton*, 350 F.3d 399, 420 (3rd Cir. 2003). Second, while Respondents state *Hill* differs because there was direct evidence of animus, Respondents, however, do not inform the Court of the direct statements of animus in this case, made by Dr. Cozette about Petitioner after Petitioner had engaged in the protected speech.[2] Third, the fact the subordinate teachers in this case do not have any decisionmaking authority does not distinguish it from *Hill*. Fourth, Respondents admit in their brief (p. 23) that a conflict does exist on the issue raised by Petitioner and by *Hill*. Fifth, in the cases Petitioner has cited in her Petition (pp. 19-26), the other circuit courts did not distinguish between whether the biased subordinates had decisionmaking authority or not. In any event, the principle of law which *Hill* has challenged in this Court, is similar to and related to Petitioner's case.

Respondents next contend there is no conflict because the lower court has already addressed the issue of the influence of a biased subordinate in a decisionmaker's decision to take adverse action against an employee. Respondents are

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[2] In summer and fall, 2000, Dr. Cozette made statements to other principals and school district employees that "Howard would never work as a principal at Columbia Public Schools again," and "Every principal gets fired at least once in their career," and "Howard was not going to be an employee much longer," and "Howard has filed a lawsuit and would not be employed with the district next year." (App. 2311-12, 2316-17, 2625, 2634-35, 2648-49).

mistaken. The Eighth Circuit in *Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991) and *Roberts v. Van Buren Public Schools*, 773 F.2d 94 (8th Cir. 1985) did not specifically address this issue. Even assuming *arguendo*, the lower court had addressed the issue in those cases, the fact still remains that the lower court did not follow its own precedent. This is particularly disturbing because the types of evidence accepted by the Eighth Circuit in those cases as being sufficient to establish causation, is similar to the types of evidence Petitioner presented in this case. As a result of the lower court rejecting Petitioner's evidence it has disregarded its own precedent, negated those decisions, and has created a conflict with other circuits.

Petitioner has sufficiently demonstrated in her petition that the conflicts between the Eighth Circuit and other Circuit Courts are real and intolerable. Review is warranted by the Court.

III. The Factual Premises on which Petitioner bases her causation arguments are supported by the Evidentiary Record which was presented to the Lower Courts.

Respondents' characterization of Petitioner's evidence as based on "misrepresentations" or "exaggeration" is nothing more than a transparent attempt to disparage (without any legitimate basis) Petitioner's substantial evidence which is supported by the record. Petitioner's statement of facts contained in her Petition is accurate, and is supported by competent evidence admissible under Fed.R.Civ.P. 56(e). This same evidence was presented to the lower courts. Petitioner's summary of some of the evidence proving causation, including strong evidence of the substantial influence the teachers had on Ritter and Cozette and strong evidence linking Petitioner's speech to the adverse employment actions taken against her, is set out in Petitioner's Petition. (See pp. 5-14). It is significant to note that Respondents did not in their brief, dispute most of Petitioner's causation facts set out in her Petition on pages 5-14. That is because the majority of Petitioner's facts on causation are undisputed.

Respondents inaccurately state Petitioner did not provide any evidence of retaliation in her deposition other than her "belief." This is completely erroneous. Respondents ignore Petitioner's testimony where she testified: "I think my message kept getting, it got out more and more and more and it got more frequent toward the end of the year. Teachers were offended by the fact that I was talking about the minority and the disadvantaged and the special needs. They were offended by that. They didn't like what I had to say. PTA I talked about that we need to serve more of the disadvantaged students. PTA members were offended by that." (App. 1524). Petitioner also testified: "I believe what I was saying was not along the company line in terms of minority and disadvantaged students. I'm saying the minority and disadvantaged students are not getting an equitable education." (App. 1523-1525). Petitioner did talk about discrimination against minority students to Dr. Cozette. Petitioner testified she told Cozette teachers were excluding students from field trips and that it was minority children. (App. 1520). She also used the term "special needs" when speaking to Dr. Cozette. (App. 1519, 1521). As further evidence of causation, Petitioner testified in her deposition as to being treated disparately. She testified, 'Had it not been for my speech, CPS would have gone through a normal management process with me and would have given me remediation and due process like they did with everyone.'[3] (App. 1523-1525). Evidence that Petitioner was treated less favorably than other similarly situated employees is a recognized method of establishing causation raising an inference of unlawful motivation. *Marquez v. Bridgestone/Firestone, Inc.*, 353 F.3d 1037 (8th Cir. 2004).

Next, Respondents attempt to argue there is no evidence of causation because Petitioner's protected speech involved the same issues Respondents were emphasizing as to literacy and school improvement. Petitioner's protected

[3] Petitioner's summary of the evidence of disparate treatment is stated in her Petition at page 10.

speech was much more extensive and involved the discriminatory conduct of CPS employees towards minority, special needs and economically disadvantaged students. There is no evidence in this case that Respondents, nor any principal within the district, spoke out about or emphasized the same issues Petitioner was raising. Even assuming *arguendo*, Petitioner's speech was the same issue as emphasized by Respondents, Petitioner could still establish causation. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1054-1055 (6th Cir. 2001) [rejecting the school's argument that the teacher's speech impacted the "efficient operation of the school and a harmonious environment because her speech had been pre-approved by them and thus the disruptive consequences of the employee's speech traced back to the government's express decision permitting her to engage in that speech."].

Respondents also attempt to argue that there is evidence of other persons, who were not Lee teachers, who purportedly had concerns about Petitioner's communication skills. Respondents do not advise the Court that these purported "facts" were inadmissible under Fed.R.Civ.P. 56(e) and Fed.R.Evid. 801(C). Respondents also do not advise this Court that Ritter and Cozette did not have these "facts" until after Petitioner had been removed, and thus could not have relied on these "facts" when making the decision to remove Petitioner from Lee. (App. 2192, 1174A, 1159).

Respondents' last argument is that Petitioner has misrepresented facts. As stated above, Petitioner's facts are accurate and supported by the evidentiary record. There are, however, some disputed facts in this case. The disputed facts Respondents mention in their brief do not go to Petitioner's causation argument. In any event, Petitioner presented competent admissible evidence controverting Respondent's facts demonstrating genuine issues of fact existed. While Petitioner is not able to in this Reply brief address every fact Respondent claims Petitioner has misrepresented, Petitioner did present evidence demonstrating that there have been no misrepresentations. Petitioner did present evidence proving: (1) Petitioner

received excellent evaluations showing she met and/or exceeded performance requirements in aspects of her job performance; (2) Petitioner did not misrepresent the extent of the problem to Cozette. Petitioner informed Cozette of numerous teachers' resistance to literacy and school improvement; (3) Petitioner was demoted from principal to a research assistant position. It was not a promotion as Respondents infer (for the first time in this case). The position was not comparable, it was adverse. Petitioner lost her title as Lee principal, suffered a loss of status among her peers. The salary was lower. There were no job duties and a downward shift in skill level. (App. 1174, 12-4-1205); (4) Petitioner did not agree to nor did she accept the research assistant position; (5) Respondent's claim that 11 of 14 full-time teachers signed the June 10th letter is wrong. Four of the teachers who signed the June 10 letter (Altomari, Corn, Sample and Schauwecker) were not regular classroom teachers; (6) Respondent's claim that the Lee teachers/staff Brunda, Steinhubel, Rutter, James, Gilbert, Wilcoxin, Boatman, Milam and Andrews were part-time employees is inaccurate. All were assigned to Lee full-time and/or were in the Lee building every day, regularly attending faculty meetings. These teachers testified as to their observations that Petitioner had excellent communication, interpersonal and leadership skills; (7) Teachers did have influence in initiating the parent letters. One parent went to the meeting where the teachers were conspiring against Petitioner and showed her letter to them before sending it. Teacher Andre telephoned parents, including the PTA president; (8) When negotiating the principal position at Blue Ridge, Petitioner did not negotiate that she would receive paid time off to look for other employment. Petitioner expected that she would have future employment.

As to the Blue Ridge principal position vacancies, Petitioner presented evidence that Ritter and Cozette knew the teachers at Blue Ridge wanted Petitioner to be the principal. Petitioner also presented the deposition testimony of the Blue Ridge principal, who denied stating

Petitioner would not be good for the Blue Ridge principal position. He testified Petitioner should have been considered as a candidate. (App. 1081, 2598-99, 2616, 2659). Petitioner presented evidence that prior to Petitioner being assigned to Blue Ridge that Blue Ridge previously had a third elementary principal before Petitioner and that other elementary schools in the district have had three principals assigned to the schools. (App. 1073-1075, 2966, 2997). As to Respondents' argument that Howard was not qualified for the positions, Ritter, Cozette, and the HR director Mary Laffey all testified Petitioner was qualified for the positions. (App. 2103, 2188, 2196-99, 3009). Instead Respondents selected persons with less education and qualifications than Petitioner, some with no principal experience. (App. 1077-1088).

CONCLUSION

For the reasons stated in Petitioner's Petition for Writ of Certiorari and in this Reply Brief, a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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October 2004